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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JACQUELINE TURNER, on behalf of herself and all others similarly situated,

Petitioner,

v.

BENEFICIAL CORPORATION, BENEFICIAL NATIONAL BANK, USA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should the Eleventh Circuit's imposition of a detrimental reliance requirement be reversed because it is inconsistent with the plain language of, the framework created in and the remedies established by the Truth-in-Lending Act, 15 U.S.C. § 1640(a)(1)?

II. Should the Eleventh Circuit's imposition of a detrimental reliance requirement in a civil RICO action predicated on mail and wire fraud be reversed because it is inconsistent with this Court's decision in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and in conflict with the authority in other Circuit Courts of Appeal?

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner Jacqueline Turner brings this action individually and on behalf of all others similarly situated. She has no corporate affiliations.

Respondents

Beneficial Corporation and Beneficial National Bank, USA are the Respondents.

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PETITION FOR WRIT OF CERTIORARI

Jacqueline Turner respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit is reported as follows: *Turner vs. Beneficial Corp.*, 242 F.3d 1023 (11th Cir. 2001). It is reproduced in the Appendix at App. 1-13. The order vacating the previous panel's decision and directing that the matter be reheard by the court *en banc* is reproduced in the Appendix at App. 14-16. The order denying Ms. Turner's Motion requesting oral argument is reproduced in the Appendix at App. 17. The now vacated panel decision is reported as follows: *Turner vs. Beneficial Corp.*, 236 F.3d 643 (11th Cir. 2000). It is reproduced in the Appendix at App. 18-32. The order granting Ms. Turner's timely petition for permission to appeal pursuant to Fed.R.Civ.P. 23(f) is reproduced in the Appendix at App. 34.

JURISIDICTION

The Eleventh Circuit's opinion was issued on February 22, 2001. A timely Petition for Writ of Certiorari has

been filed with this Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTUES INCLUDED

The federal statutes involved in the questions presented for review are the Truth-in-Lending Act ("TILA"), 15 U.S.C. § 1601, *et. seq.*, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et. seq.*. Regulation Z, which implements TILA, commences at 12 C.F.R. § 226. In pertinent part, 15 U.S.C. § 1640(a) provides:

> (a) **Individual or class action for damages; amount of award; factors determining amount of award.** Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter, including any requirement under section 125, or chapter 4 or 5 of this title, with respect to any person is liable to such person in an amount equal to the sum of –
>
> (1) any *actual damage sustained* by such person *as a result of the failure; (emphasis supplied)*
>
> (2)(A) . . .
>
> (B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the

> lesser of $500,000 or 1 per centum of the net worth of the creditor; . . .
>
> * * *
>
> In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

18 U.S.C. § 1964(c) provides: "(c)Any Person injured in his business or property *by reason of* a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fees." *(emphasis supplied).*

The emphasized language in the statutory provisions quoted above has been interpreted by the Eleventh Circuit, and by some other Circuit Courts of Appeal, to require proof of detrimental reliance to recover actual damages in TILA and RICO claims. The Eleventh Circuit decision which is the subject of this Petition is in contrast with its interpretation of that same language in TILA that detrimental reliance is not required to recover statutory damages. It is the Eleventh Circuit's imposition of that element of proof in an actual damages claim under TILA and RICO that requires review.

I. STATEMENT OF THE CASE

A. Nature Of The Case And Course Of Proceedings

Ms. Turner filed her Complaint on September 15, 1995, alleging wrongdoing relating to the financing of satellite dishes by Beneficial Corporation and Beneficial National Bank, USA (hereinafter collectively referred to as "Beneficial"). Among other claims, she alleged violations of TILA and RICO. On May 14, 1999, Ms. Turner filed a motion for class certification. The District Court denied the motion on July 26, 1999, determining that detrimental reliance was an element of proof as to both TILA and RICO and concluding that common issues did not predominate over individual ones concerning the reliance requirement. The Eleventh Circuit granted Ms. Turner's timely petition for permission to appeal on September 13, 1999.

The panel vacated the District Court's denial of class certification with respect to the TILA claim, holding that detrimental reliance was *not* an element of a TILA claim. *Turner*, 236 F.3d at 650, 651 (App. 30, 32). The panel agreed with the District Court with respect to the RICO claim, holding that detrimental reliance was an element of a RICO claim. *Id.* at 650 (App. 30).

The panel opinion was vacated. In an *en banc* opinion, the Eleventh Circuit found that detrimental reliance should be an element of a TILA claim, and therefore, it affirmed the District Court's denial of class certification on that claim. *Turner*, 242 F.3d at 1028 (App. 12). The *en banc* court left undisturbed the panel decision as it concerned the RICO claim, the result being the affirmance of

the District Court's denial of class certification. *See Turner*, 242 F.3d at 1024 n.1 (App. 3 n.1).

B. Statement of Facts

Beneficial agreed with various entities to finance the purchases of satellite dishes sold by door-to-door salespersons in rural America. Because TILA governed the disclosures which had to be provided, Beneficial had to choose between categorizing the transactions as involving open-end credit or closed-end credit.

Open-end credit describes those situations where entities like Beneficial reasonably anticipate multiple and frequent purchases. In such situations, a bank or finance company issues a Master Card or VISA card for use over a prolonged period in any number of different commercial establishments for an infinite variety of dollar amount purchases. The arrangement between the issuer and the cardholder establishes a "line of credit" that typically far exceeds the cost of any individual purchase, thus allowing the cardholder the freedom to purchase airline tickets with the card one day, a birthday gift with the card a second day, and dinner with the card a third day. So long as the credit line is not exceeded, the cardholder can pay on a monthly basis either the minimum payment due, the full amount, or any amount in between. In such a situation, it is impossible to disclose the total cost of credit, because the amount "borrowed" and/or due constantly changes, and because the interest rate and other charges are subject to a wide array of factors, like changes in the prime rate. *See* 15 U.S.C. § 1602(i). *See also*

Regulation Z, 12 C.F.R. § 226.2(a)(20); *id.* at §§ 226.5-226.16.

Closed-end credit, on the other hand, involves those situations where entities like Beneficial do not reasonably contemplate multiple and frequent transactions, such as when a bank or finance company loans money to an individual for the purchase of a large, expensive item, like a house or a car. In such a situation, the entity can determine and disclose the total cost of credit, because the transaction is or should be about the purchase of a single item at a fixed price with a fixed interest rate. In such a situation, the borrower typically pays the creditor a fixed amount on a monthly basis for a specified period, at the end of which period the debt is retired. *See* 15 U.S.C. § 1638. *See also* Regulation Z, 12 C.F.R. § 226.2(a)(10); *id.* at §§ 226.17-226.26.

If a large dollar amount transaction where multiple and frequent additional purchases were not reasonably contemplated was improperly categorized as open-end credit rather than closed-end credit, and thus more like a Master Card arrangement than a car loan, the transaction and the resulting disclosures would be violative of TILA *ab initio*. The borrower would receive a bill with a minimum monthly payment due that is significantly less than the monthly payment that might be due if the loan were scheduled to be retired over 36 or 48 or 60 payments. Moreover, the payment of only the minimum amount due, rather than a larger amount designed to pay off the loan, would never retire the debt. The consequence of categorizing the purchase of an item that costs several thousand dollars, like a satellite dish, as open-end credit rather than as closed-end credit effectively means that

persons who have been solicited by these door-to-door salespersons will forever be in debt to Beneficial, and Beneficial will recoup from the borrower many times over the cost of the satellite dish.

Prior to determining the manner of how to categorize these transactions, Beneficial examined the records of Household Finance Company, which had been financing the satellite dishes prior to Beneficial's decision to do so. These records showed multiple transactions to be virtually non-existent. Based on these records, attorneys working for and on behalf of Beneficial informed Beneficial that the transactions here at issue – the financing of satellite dishes – were not properly categorized as open-end credit.

Notwithstanding its examination of Household's records and its attorney's warning, Beneficial wrongly decided to categorize these transactions as involving open-end credit and to make the disclosures mandated by TILA in accord with that wrongful decision. Therefore, like Household had done before it, Beneficial issued special name ("Excel") credit cards to persons who agreed to purchase satellite dishes from door-to-door salespersons, which credit cards could only be used in a particular store that the purchaser had theretofore never entered. It established a line of credit for each cardholder/purchaser that only slightly exceeded the purchase price of the satellite dish so as to create the argument for itself that cardholders theoretically could purchase something else, like programming, and thus the argument that Beneficial could reasonably anticipate multiple and repetitive transactions. The reality is that few cardholders ever did, and Beneficial reasonably could not. Whether Beneficial

wrongly categorized these transactions as open-end credit rather than closed-end credit, whether the disclosures given in accord therewith were also wrongful, and whether damages are recoverable, are the common questions which Plaintiff seeks to litigate on a classwide basis.

Ms. Turner purchased her satellite dish through a door-to-door salesperson from Star Vision, Inc. The financing of the dish was to be provided through an agreement between Beneficial and Star Vision by way of an Excel credit card issued by Beneficial which could only be used to purchase goods and services from Star Vision. The disclosures made in conjunction with the purchase and the financing were those called for in an open-end credit transaction rather than a closed-end credit transaction. Those disclosures were improper and caused Ms. Turner, and others like her, harm. *See Turner*, 242 F.3d at 1024 (App. 4). (Beneficial did not dispute Turner's claim that the disclosures were improper).

II. REASONS FOR GRANTING THE WRIT

This Petition involves the Eleventh Circuit's utter failure to engage in normal statutory construction, the results of which failure are the misconstruction of two statutory provisions and the imposition of a requirement that persons prove detrimental reliance to recover actual damages under TILA and RICO. The Eleventh Circuit's decisions are inconsistent with *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973) (TILA creates a system of private attorneys general and should be construed liberally to achieve its remedial purpose), and

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) (requiring proximate cause in RICO but not reaching question of detrimental reliance). The decision with respect to TILA also is inconsistent with *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (consumer class actions proper use of Rule 23(b)(3)), in that TILA expressly provides for class actions for actual damages and in that the imposition of a detrimental reliance requirement nullifies that provision of the statute. *See* 15 U.S.C. § 1640(a). The decision with respect to RICO also is in conflict with the decision of at least the Third Circuit in *Tabas v. Tabas*, 47 F.3d 1280, 1294 n.4 (3rd Cir.) (*en banc*), *cert. denied*, 515 U.S. 1118 (1995) (reliance not an element of a civil RICO claim).

A. This case presents an important question of federal law which has not been but should be settled by this Court, for the statutory interpretations of the Circuit Courts of Appeal have nullified and made surplusage the express language of TILA.

This Court never has written to whether a consumer Plaintiff must prove detrimental reliance to recover actual damages under TILA. The statute does not impose such a requirement, either expressly or implicitly, but the statute expressly *does allow* for class actions for actual damages. Inconsistent with the canons of statutory construction, the Circuit Courts, including the Eleventh Circuit, have overruled Congress, and imposed a detrimental reliance requirement, thereby nullifying Congress' recognition that the class action is an appropriate device to enlist

private attorneys general to enforce the statute. The Eleventh Circuit's decision is in conflict with this Court's recognition that the consumer class action involving small individual recoveries and little incentive for individual lawsuits was one of the dominant purposes behind the enactment of Rule 23(b)(3). *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997). The Eleventh Circuit's holding in this case effectively precludes that which Congress expressly authorized – a class action for actual damages under TILA. Because proof of detrimental reliance is economically inefficient and practically impossible, the imposition of detrimental reliance as an essential element of a TILA claim for actual damages effectively prevents such claims. Because proof of individual detrimental reliance is universally raised by defendants and almost always accepted by courts as the insurmountable obstacle to the certification of a TILA action as a class action, the imposition of detrimental reliance as an essential element of a TILA claim for actual damages effectively ends any such class actions. Thus, detrimental reliance cannot be written into the statute as an element of a TILA claim consistent with Congress' words and its intent.

The starting point for the interpretation of any statute is the language itself. Where the language is plain, the court should enforce it according to its terms. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). A statute should be read as a whole since the meaning of statutory language, plain or not, depends on context. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). Words should be given their ordinary or natural meaning, and courts should read statutes with the assumption that Congress

intended each of its terms to have import. *Bailey v. United States*, 516 U.S. 137, 145 (1995). A finding of ambiguity is the exception.

> A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988) (citations omitted).

The Eleventh Circuit did not give words their plain and ordinary meaning. It did not read the statue as a whole or place the words in context. With only a cursory analysis, the Eleventh Circuit held that the phrase "any actual damages sustained . . . as a result" indicated that the "statute's authors intended that Plaintiffs must demonstrate detrimental reliance in order to be entitled to actual damages under TILA." *Turner*, 242 F.3d at 1028 (App. 12) (quoting 15 U.S.C. § 1640(a)(1)). Without any analysis of the statute's framework with respect to its provisions allowing for class actions to recover actual damages, the Eleventh Circuit relied on legislative history behind the *1995* amendments to TILA, notwithstanding that the actual damages provisions were included in TILA in 1974 and that class actions for actual damages have been expressly authorized since that time. *See Turner*, 242 F.3d at 1028 (App. 12) (citing H.R. Rep. No. 193, 104, 104th Cong., 1st Sess. (1995)).

To decide an issue of such monumental importance to consumers on the basis of a parsed reference to the statute and legislative history created 21 years after the fact is somewhat incredulous, particularly when the decision runs counter to the express purpose of TILA and to the express language of the statute regarding both actual damages and the availability of class actions for actual damages. This Court should review this decision.

Neither the statute nor the regulations references reliance. Longstanding Circuit Court authority establishes that reliance is not an element of a claim for statutory damages. *See, e.g., McGowan v. King, Inc.*, 569 F.2d 845 (5th Cir. 1978). The Federal Reserve Board does not need to show that consumers relied to their detriment when it takes enforcement action and seeks to recover actual damages. *See* 15 U.S.C. § 1607. Yet the Circuit Courts have interpreted TILA to require detrimental reliance to recover actual damages. Nothing in the statute suggests such whimsy. It is inconsistent with the plain language that reliance not be required as an element of a claim for statutory damages or of an agency claim for actual damages, yet imposed as an element of an individual's claim for actual damages. Such imposition disrupts the scheme of this statute and makes Congress' language with respect to class actions for actual damages mere surplusage.

TILA is not ambiguous. The plain language of TILA specifically provides that damages in both individual and class actions be an amount equal to the sum of actual and statutory damages and that the amount of actual damages be considered as a factor in determining the amount of statutory damages awarded. *See* 15 U.S.C. § 1640(a).

Reading the statute in context, then, and giving each of the provisions and terms their ordinary or natural meanings, the statute should be read and applied so as to permit actions involving TILA violations to proceed as class actions and so as to permit the recovery of actual damages, where present, in addition to statutory damages. This means that detrimental reliance cannot be imposed as an element of a TILA actual damages claim, because to do so makes the recovery of actual damages and the prosecution of a class action almost impossible. *See, e.g., Perrone v. GMAC*, 232 F.3d 433, 440 (5th Cir. 2000) (since individual reliance is necessary to prove actual damages under TILA, a class action may not be certified on this issue), *cert. denied.*, ___ U.S. ___, 121 S.Ct. 1601 (2001).

To establish detrimental reliance, as that element has been described in *Perrone, supra*, and in *Peters v. Jim Lupient Oldsmobile Co.*, 220 F.3d 915, 917 (8th Cir. 2000), Ms. Turner would have to show the following. First, she read and understood the disclosure statement. Second, upon learning later that Beneficial had wrongly categorized the transaction as one involving open-end credit rather than closed-end credit and thus that the disclosures she had read and understood were inaccurate, she would have declined to purchase the satellite dish from the door-to-door salesperson. Third, having decided not to purchase the satellite dish from the door-to-door salesperson, she would nonetheless been so committed to the purchase of a satellite dish that she would have endeavored to purchase one on more favorable legal terms. And, fourth, she would have found the same or a comparable satellite dish on such favorable legal terms

and purchased it. A Plaintiff should not have to engage in a "what-if" transaction to recover damages that flowed directly from the wrongful financing and disclosures.

In the absence of any real analysis, the Eleventh Circuit apparently relied on certain other opinions, the leading opinion of which appears to be *Perrone*. *See Turner*, 242 F.3d at 1026 (App. 7). The *Perrone* Court gave no weight to the absence of the words "reliance" or "detrimental reliance." It subtly rewrote the statute. It equated "causation" with "reliance." It failed to read the statute in context. It wrongly determined that the damages measures are mutually exclusive rather than, for the most part, equally available, and it did not take into account those situations where statutory damages are unavailable. It misunderstood the nature of the claims in *Jones v. Bill Heard Chevrolet, Inc.*, 212 F.3d 1356 (11th Cir. 2000), and *Gibson v. Bob Watson Chevrolet*, 112 F.3d 283 (7th Cir. 1997), both of which involved TILA violations for which statutory damages were unavailable, and thus it incorrectly distinguished those cases. It relied on an Eleventh Circuit case, *Adiel v. Chase Federal Savings & Loan Assn.*, 630 F.Supp. 131 (S.D. Fla. 1986), *aff'd*, 810 F.22 1051 (11th Cir. 1987), that even the Eleventh Circuit correctly held did not hold as the *Perrone* Court determined. *Compare Turner*, 242 F.3d at 1072 (App. 9-10), *with Perrone*, 232 F.3d at 438. It transposed reliance into TILA from common law fraud even while recognizing that TILA does not have its roots in that body of law. *Perrone* is wrong on too many points to constitute reliable authority, yet the Eleventh Circuit relied on it nonetheless.

Without even acknowledging the absence of the key phrase "detrimental reliance," and without beginning its

analysis with the recognition that Congress provided for the recovery of actual damages in individual and in class actions, the *Perrone* Court turns to *Black's Law Dictionary* to construe the words "actual damages." The court notes that actual damages are "compensation for actual injuries or loss," "flow from injury in fact," and "make good or replace the loss caused by the wrong or injury," and then it concludes that the statutory remedy requires a direct causal relationship between the amount of damages and the injury or harm. *Perrone*, 232 F.2d at 435-36, *quoting Black's Law Dictionary* 35 (6th ed. 1990). Engaging in some subtle rewriting of the statute, the *Perrone* Court then says: "That the 'actual damages' must be 'sustained by such person as a result of the failure' links the loss to the failure to disclose." *Id.* at 436, *quoting* in part 15 U.S.C. § 1640(a)(1). The statute actually provides that a wrongdoer is liable for "any actual damage sustained by such person as a result of the failure"[,] 15 U.S.C. § 1640(a)(1), and the "failure" refers to the preceding text and means not a failure to disclose, but a failure "to comply." *See* 15 U.S.C. § 1640(a). In any event, the *Perrone* Court then leaps over logic and language to conclude that a consumer must show that, "had he been properly informed, he would have engaged in a different or less-expensive transaction." *Perrone*, 232 F.3d at 436. Based on this tortured reasoning of how to show a direct causal relationship, the *Perrone* Court concludes that the "plain meaning" indicates a plaintiff must show individual detrimental reliance on a disclosure violation. *Id.*

If, upon concluding a causal relationship was required, the *Perrone* Court had looked up "causal," "causation" and/or "causative," it would have found those

words defined as "[o]f, relating to, or involving causation," "[t]he causing or producing of an effect," and "[e]ffective as a cause or producing a result." *Black's Law Dictionary* 212 (7th ed. 1999). "Result," of course, is in the statute, though it is not in *Black's Law Dictionary*. Result means "[t]he consequence or outcome of an action." Webster's II New College Dictionary 946 (1995). Thus, when the statute provides for the recovery of actual damages sustained as a result of the failure to comply, it is providing for the recovery of damages that arise as the outcome of the creditor's action. The result *is* the result, notwithstanding any detrimental reliance.

Criticizing the *Perrone* Court is not merely sniping. Rather, it emphasizes that the *Perrone* Court and subsequently the Eleventh Circuit which adopted the *Perrone* Court's reasoning failed to follow the rules of statutory construction by not adhering to the plain language of the statute and not reading the statute in context and as a whole. First, courts should read TILA so as to make possible, not impossible, the recovery of actual damages and the prosecution of a class action for actual damages. Second, courts cannot utterly fail to consider the meaning of section 1640(a). It provides that " . . . any creditor who *fails to comply with any requirement* . . . with respect to any person *is liable* to such person in an amount equal to the sum of [(1) actual damages and (2) statutory damages]." *(emphasis added)*. Contrary to the *Perrone* Court's conclusion that a creditor has no liability unless the consumer could have and would have done something different due to a creditor's failure to disclose, section 1640(a) says that *a creditor who fails to comply is liable.*

Section 1640(a)(1) and (a)(2) simply provide for the recovery of and the measure of both actual damages, if any, and statutory damages, if available. Such actual damages are not dependent upon any detrimental reliance, but rather upon *the fact of such damages* and upon their susceptibility to proof.

The *Perrone* Court also suggests that "the damages measures are complementary rather than duplicative." *Perrone*, 232 F.3d at 436. If the *Perrone* Court's approach is correct as discussed, the damages measures are neither complementary nor overlapping but almost mutually exclusive. The court says:

> Without a causation requirement, actual damages would overlay the statutory damages for no apparent reason. Conceptually, however, statutory and actual damages perform different functions. Statutory damages are *reserved* for cases in which the damages caused by a violation are small or difficult to ascertain. Actual damages *may* be recovered where they are probably caused by the violation.

Id. (emphasis supplied). The *Perrone* Court incorrectly says that statutory damages are imposed only where actual damages are small or difficult to ascertain, and that where actual damages are present, apparently without regard to the difficult standard of proof set by the court, statutory damages should not be imposed. It is far more accurate to say that statutory damages are imposed in addition to and after considering the amount of actual damages, *see* 15 U.S.C. § 1640(a), and moreover, that they are available even where there are no actual damages or such damages are *de minimis*. In all but certain statutorily

described instances, damages are an amount equal to the sum of actual damages, if any, and statutory damages. *See* 15 U.S.C. § 1640(a) (describing exceptions to the recovery of statutory damages).

Indeed, the *Perrone* Court's alleged contextual analysis breaks down in the situation faced in *Jones v. Bill Heard Chevrolet, supra,* 212 F.3d 1356, *Gibson v. Bob Watson Chevrolet, supra,* 112 F.3d 283, and *Peters, supra,* 220 F.3d 915. There, statutory damages were not available. *See, e.g., Peters,* 220 F.3d at 917. The only damages the plaintiffs in those cases could seek were actual damages. That arises in other situations as well. Where courts impose detrimental reliance as an obstacle to the recovery of actual damages and thereby make the recovery of actual damages difficult if not impossible, particularly in the class context, and where statutory damages are by statute not available, the damages measures are not complementary, overlapping or duplicative. Damages become simply "unrecoverable."

Equally as important as the *Perrone* Court's flawed analysis of the so-called overlapping damages measures is its equating of causation and reliance. The Eleventh Circuit clearly agreed. *See* discussion *infra* (Eleventh Circuit equates causation and reliance in RICO context). But causation is not reliance. Petitioner here does not disagree that that recovery of actual damages requires proof of causation in fact. There must be a failure to comply which results in (produces an outcome of) actual damages, and the amount of those actual damages must be shown with reasonable certainty. But to require a borrower to show after-the-fact that he *would* have done

something different, and that he *could* have done something different, is an altogether different requirement that has nothing to do with the outcome of the already concluded transaction. It makes the statute's provision for "actual damages sustained" almost meaningless.

The *Perrone* Court purportedly did not rely on legislative history because it concluded the statute was not ambiguous. It recognized, however, that the legislative history supports "the understanding that statutory damages serve as an incentive to ensure compliance, while actual damages are regarded as more difficult to prove." *Perrone*, 232 F.3d at 440 (footnote omitted). The legislative history discussed in the omitted footnote indeed provides it is difficult to prove actual monetary damage and that "[m]ost [TILA] violations do not involve actual damages and . . . some meaningful penalty provisions are therefore needed to ensure compliance." *Perrone*, 232 F.3d at 440 n.7, *referencing* and *quoting* S. Rep. No. 93-278, at 14, 15 (1973). The legislative history does not say and does not support the conclusion that detrimental reliance is an element of an actual damages claim, and since such damages already are recognized as not often occurring and being difficult to prove, it seems contraindicative of Congress' intent and purpose to make actual damages even more difficult to prove by imposing the element of detrimental reliance.

The Eleventh Circuit did rely on the legislative history, but incongruously, it relied not on legislative history contemporaneous with the inclusion of the actual damages provision but on the history behind the *1995* amendments. *Turner*, 242 F.3d at 1028. (App. 12). A statement in the legislative history made in 1995 cannot support the

conclusion that Congress in 1974 intended to impose the requirement of detrimental reliance. This Court said in a case involving another chapter of the Consumer Credit Protection Act – the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* – that a statement made after the statute became law is not a statement upon which other legislators might have relied in voting for or against the Act. *Heintz v. Jenkins*, 514 U.S. 291, 298 (1995). "Post passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage." *In re Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974).

In 1995, a bill was introduced in Congress to attempt to do expressly what the Eleventh Circuit has now done: impose the requirement of detrimental reliance upon the consumer in actual damages claims. The bill, 104th Congress 1st Session H.R. 1362, failed of passage.[1] This failed bill evidenced the intent at least of the current Congress

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[1] Section 112, Calculation of Damages, found at page 16 of the Proposed Bill, sought to amend TILA as follows: Paragraph (1) of Section 130(a) of the Truth in Lending Act (15 U.S.C. 1640(a)) is amended to read as follows:

> (1) Any actual damages sustained by such person as a result of the failure (to the extent the person demonstrated reliance on the inaccurate disclosure which prevented the person from accepting better credit terms actually available to the person from another credit) and the amount of such damages shall be the difference between the finance charges actually paid and the finance charges that would have been paid over the same period under terms applicable with respect to credit actually available from another creditor.

that such a provision should not exist, and it is some indication that detrimental reliance was not understood to be a required element of proof in a TILA claim for actual damages. In *Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186 (1974), this Court faced a similar question as to Congressional intent regarding a particular statute. In that case, the Court held that the deletion of a provision from a bill in conference committee strongly militated against a judgment that Congress intended a result it had expressly declined to enact.

The Eleventh Circuit cannot rely on statements made by a legislator concerning an amendment that failed to pass, particularly when such statements were made twenty-one years after the fact. When this statement is given the only meaning it might possibly have – that in 1995 detrimental reliance was not an element of an actual damages claim and that an effort to make it so failed – the legislative history overwhelmingly supports Petitioner's position that detrimental reliance should not be an obstacle to a consumer's recovery of actual damages.

Nothing in the legislative history suggests that Congress had reliance in mind when it added actual damages to the Act in 1974. *See* Pub. L. No. 93-495 § 408 (enacted and effective October 28, 1974). Congress made actual damages available long after statutory damages were routine, adding them when restricting statutory damages and without making any suggestion that consumers should bear the heavy burden of proving detrimental reliance. Congress must have recognized that reliance on the lack of a disclosure or on a creditor's intentional decision to make the wrong disclosures would be nearly impossible to prove, yet it provided that failure to comply

with the Act's requirements clearly violates TILA. Congress could have added such a reliance requirement when it amended TILA, but it did not.

The Eleventh Circuit did not address any of the arguments made above regarding the proper construction of the statute, the impropriety of relying on subsequently created legislative history, the devastating consequences of its decision on the statutory scheme established by Congress, and the fallacies in the *Perrone* Court's reasoning. The Eleventh Circuit even denied Ms. Turner's motion for oral argument on this important issue and rendered an *en banc* opinion that is devoid of reasoning. (App. 17). The Eleventh Circuit has disregarded Congress' words, framework and intent and created a statute that bears little resemblance to the one Congress wrote. *See Anderson v. Wilson*, 289 U.S. 20, 27 (1933) (Court takes the statute as it finds it without considering whether it might be framed differently so as to create results more consonant with fairness and reason).

If this Court determines that detrimental reliance is an element of a TILA actual damages claim, this Court should give some direction as to the manner in which detrimental reliance can be shown that is consistent with the consumer's statutory right to bring an individual and class action for actual damages. In *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W. 2d 2 (Minn. 2001), the Minnesota Supreme Court considered whether a Petitioner must plead and prove individual reliance to recover damages under a consumer protection statute. *Id.* at 11. The applicable language of the statue authorized claims by "any person injured by a violation of . . . " *Id.*, quoting Minn. Stat. § 8.31, subd. 3a. The court determined

a Petitioner need not plead or prove "traditional common law reliance. . . . " *Group Health Plan, Inc.*, 621 N.W. 2d at 13. However, the court held that "causation remains an element of such a claim[,]" and that such causation involves a component of reliance on statements or conduct. *Id.*

> [T]he showing of reliance that must be made to prove a causal nexus need not include direct evidence of reliance by individual consumers. . . . Rather, the causal nexus and its reliance component may be established by other direct or circumstantial evidence that . . . is relevant and probative as to the relationship between the claimed damages and the alleged prohibited conduct.

Id. at 14.

The court continued:

> To impose a requirement of proof of individual reliance in the guise of causation would reinstate the strict common law reliance standard that we have concluded the legislature meant to lower for these statutory actions. Moreover, we are confident that the legislature would not have authorized private damages actions such as this, where the alleged misrepresentations are claimed to have affected a large number of consumers, while retaining a strict burden of proof that depends on evidence of individual consumer reliance.

Id. at 15.

This Court should provide similar guidance regarding the consumer protection statute here at issue. A requirement that Petitioners show individual detrimental

reliance rather than showing a causal nexus short of such reliance undermines the viability of TILA.

To recover actual damages in either an individual or class action, consumers should not be forced to undertake the economically inefficient and practically difficult "imaginary transaction" contemplated in *Perrone* and *Peters*, which transaction imposes costs in time and money on both the consumer and the business(es) which the consumer must visit in association therewith. Such a requirement should be rejected in favor of no requirement of detrimental reliance or of one that does not include direct evidence of reliance by individual consumers.

B. The requirement that a plaintiff in a civil RICO action must prove detrimental reliance is inconsistent with this Court's *Holmes* decision and in conflict with other Circuit Court decisions

The *en banc Turner* Court left undisturbed the panel's decision with respect to Plaintiff's RICO claim. The panel and thus the *en banc* Court's decision – that when the predicate act alleged is mail or wire fraud, the Plaintiff must prove she relied to her detriment on the misrepresentation – was based on *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991), *cert. denied*, 502 U.S. 855 (1991). *See Turner*, 236 F.3d at 650 (App. 30-31); *Turner*, 242 F.3d at 1024 n.1 (App 3 n.1).

But *Pelletier* has been questioned by this Court regarding the very interrelationship that is at issue here, that is, where directness of injury and proximate cause

stop and detrimental reliance starts. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 274 n. 20 (1992) ("direct" should be understood as a reference to the proximate cause enquiry informed by the text and it is not necessarily used in the same sense as other courts have used it, citing as one example *Pelletier*, 921 F.2d at 1499-1500). "Proximate cause" as discussed in *Holmes* is a label for "the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Holmes*, 503 U.S. at 268. The concept demands "some direct relation between the injury asserted and the injurious conduct alleged." The injury asserted by Ms. Turner, that is, the payment of money under the admittedly wrongful financing and disclosures made here in excess of that which would have been made under the proper financing arrangement, is directly related to the use of open-end credit rather than closed-end credit and to the disclosures made as a consequence thereof. Unlike the situation in *Holmes*, the harm to Ms. Turner and others is not "harm flowing merely from the misfortunes visited upon a third person by [Beneficial's acts]. . . . " *Holmes*, 503 U.S. at 268-69.

In *Turner*, the Eleventh Circuit has gone beyond a proximate cause requirement and required not only directness but also detrimental reliance. That is inconsistent with the *Holmes* decision. Causation is not reliance and individual detrimental reliance is not an indicator of directness, particularly where the wrong complained of is the intentional misuse of or the concealment of information by one with superior knowledge. The Eleventh Circuit *Turner* decision also is in conflict with other Circuit Courts of Appeal with respect to the necessity to prove

detrimental reliance. *See Tabas v. Tabas*, 47 F.3d 1280, 1294 n.18 (3rd Cir. 1995) (*en banc*) (inaccurate to assert Plaintiffs must rely on mailings to establish a RICO claim), *cert. denied*, 515 U.S. 118 (1995); *Akin v. Q-L Investments, Inc.*, 959 F.2d 521, 533 (5th Cir. 1992) (RICO claim based on predicate act of mail fraud does not require showing of detrimental reliance). *See also System Mgt., Inc. v. Loiselle*, 112 F.Supp.2d 112 (D. Mass, 2000) (discussing conflict in Circuit Courts of Appeal). The Eighth Circuit also seems to have adhered to the *Holmes* decision faithfully. *See Hamm v. Rhone-Poulenc Rorer Pharmaceuticals, Inc.*, 187 F.3d 941, 952 (8th Cir. 1999) (RICO claim requires showing of proximate cause, that is, directness between the injury and the conduct), *cert. denied*, 528 U.S. 1117 (2000). In addition to clear conflict, confusion also exists. *See Chisolm v. Transouth Financial Corp.*, 95 F.3d 331, 336-37 (4th Cir. 1996). (reliance imposed as an element of a civil RICO claim based on mail fraud even though no reliance must be proved to obtain a conviction for mail fraud).

In *Tabas*, the Third Circuit *en banc* noted that completely innocent mailings can satisfy the mailing element and that the use of the mails need not be an essential element of the fraudulent scheme so long as the mailings are incidental to the scheme. *Tabas*, 47 F.3d at 1294 n. 18, citing among other cases *Schmuck v. United States*, 489 U.S. 705, 715 (1989), and *Pereira v. United States*, 347 U.S. 1, 8 (1954). Here, the mailings and wirings between and among Beneficial, Star Vision and Ms. Turner are at a minimum incidental to the scheme in that it was through such communications between and among them that the arrangements were consummated, the bills sent and the payments made.

There is at a minimum confusion and at worst a conflict among the Circuit Courts of Appeal regarding the necessity of proving detrimental reliance to establish a RICO claim where the predicate act is mail fraud. This Court should review the Eleventh Circuit decision imposing that requirement.

III. CONCLUSION

The Eleventh Circuit has interpreted two statutes with slightly different language so as to require proof by Plaintiffs of detrimental reliance to recover actual damages even though the word reliance is not in either statue. Such interpretation is in conflict with and/or inconsistent with decisions of this Court and other Circuit Courts of Appeal. With respect to its decision concerning TILA, the Eleventh Circuit's decision reduces that statute to a shell of the statute Congress intended and created. Petitioner

urges this Court to grant her Petition and issue a Writ of Certiorari to the Eleventh Circuit.

Respectfully submitted,

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United States Court of Appeals,
Eleventh Circuit.

Jacqueline TURNER, on behalf of herself and all others similarly situated, Plaintiff-Appellant,

v.

BENEFICIAL CORPORATION, Beneficial National Bank, U.S.A., Defendants-Appellees.

No. 99-13381.

Feb. 22, 2001.

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Burt M. Rublin, Ballard, Spahr, Andrew & Ingersoll, Philadelphia, PA, for Defendants-Appellees.

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Appeal from the United States District Court for the Middle District of Alabama.

Before ANDERSON, Chief Judge, and TJOFLAT, EDMONDSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS and WILSON, Circuit Judges.

BARKETT, Circuit Judge:

ON SUA SPONTE REHEARING EN BANC

Jacqueline Turner brought this interlocutory appeal, pursuant to Federal Rule of Civil Procedure 23(f), from the denial of class certification in her suit alleging that defendant Beneficial Corporation, a.k.a. Beneficial National Bank, violated the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq. ("TILA") and the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 et seq. ("RICO"), and also committed common law fraud in transactions related to its financing of Turner's purchase of a satellite dish.

The district court determined that detrimental reliance was a necessary element to each of Turner's claims and, finding no detrimental reliance, denied class certification. A panel of this Court affirmed the district court's denial of class certification on Turner's claims except for the TILA claim for actual damages. Finding itself bound by this Court's earlier ruling in *Jones v. Bill Heard Chevrolet, Inc.*, 212 F.3d 1356, 1363 (11th Cir.2000), that a plaintiff need not demonstrate detrimental reliance on a lender's misrepresentations in order to bring a claim for actual damages under TILA, the panel vacated the district court's denial of class certification on that claim. *See United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir.1993) ("[I]t is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court.").

By vote of a majority of the judges in active service, we now rehear this appeal en banc for the sole purpose of

reconsidering the question of whether detrimental reliance is an element of a TILA claim for actual damages. We find that it is, vacate the panel's ruling on that issue, and affirm the district court's denial of class certification as to all of Turner's claims.[1]

BACKGROUND

This case arises out of Turner's purchase of a satellite dish system from Star Vision, Inc., prompted by a newspaper advertisement which indicated that monthly charges for this service would be $39.95. The financing of the dish and the monthly service were to be provided through an agreement between Beneficial National Bank ("Beneficial") and Star Vision by way of an "Excel" credit card issued by Beneficial which could be used only to purchase goods and services from Star Vision. When the satellite system was delivered, the invoice reflected a monthly bill of $48.36, as did the Excel bill from Beneficial. With the Excel card, Turner had received TILA disclosure statements, but Turner alleges that these disclosures failed to reveal the true cost of financing the purchase of the satellite dish.[2]

Although Turner concedes that she did not read Beneficial's disclosure statements at the time of receipt and

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[1] The panel's disposition of all other issues is unaffected by this opinion.

[2] Specifically, Turner contends that, pursuant to 15 U.S.C. § 1638, Beneficial should have disclosed: (1) the number of payments; (2) the amount of each monthly payment; (3) the amount financed; (4) the total finance charge; (5) the total of payments; and (6) the total sales price.

therefore did not rely on them, she claims that she is entitled to damages for Beneficial's failure to provide disclosure statements that complied with the requirements of the law under TILA. Beneficial does not dispute Turner's claim that the disclosures were improper. Instead it points out that, because Turner did not read the disclosure statements, she did not rely upon them to her detriment and thus could not have suffered actual injury as a result of Beneficial's TILA violation. The district court found that detrimental reliance is a necessary element of Turner's claim for actual damages under TILA and denied class certification on that claim. We review class certification rulings for abuse of discretion. *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1381 (11th Cir.1998) (en banc). We review de novo the district court's conclusions of law that informed its decision to deny class certification. *DeKalb County School Dist. v. Schrenko*, 109 F.3d 680, 687 (11th Cir.1997).

DISCUSSION

A court can certify a class only when the requirements of Rule 23(a) and at least one of the alternative requirements of Rule 23(b) are satisfied. *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir.1997). Turner maintains that all of the requirements of Rule 23(a) are satisfied[3] and that the class also satisfies Rule

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[3] A class may be certified if the following requirements are met: (1) numerosity: the class is so numerous that joinder of all members is impracticable; (2) commonality: questions of law or fact are common to the class; (3) typicality: the representatives of the class present claims or defenses that are typical of the

23(b)(3), which requires that questions of law or fact common to all members of the class predominate over questions pertaining to individual members. Finding that Turner's inability to prove detrimental reliance precluded her from satisfying the typicality and adequacy requirements of Rule 23(a)(3) and (4), the district court refused to certify a class on Turner's claim for actual damages under TILA.

The TILA provision governing actual damages reads:

> Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to . . .
>
> (1) any actual damage sustained by such person as a result of the failure;. . . .

15 U.S.C. § 1640(a)(1) (1998).

In addition to allowing for actual damages, TILA provides three other remedies for violations of its provisions. First, TILA empowers the Federal Trade Commission as its overall enforcement agency, 15 U.S.C. § 1607(c), and provides other federal agencies with enforcement authority over specific categories of lenders. 15 U.S.C. § 1607(a). The enforcing agencies are authorized to require the creditor to "make an adjustment to the account of the person to whom credit was extended, to assure that such person will not be required to pay a

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class; and (4) adequacy: the representatives of the class will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a).

finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower." 15 U.S.C. § 1607(e)(1).[4] Second, TILA imposes criminal liability on persons who willfully and knowingly violate the statute. 15 U.S.C. § 1611. Finally, TILA creates a private cause of action for statutory damages, which may be assessed in addition to any actual damages awarded. 15 U.S.C. § 1640(a)(2)(A).

As necessary, Congress has amended TILA to ensure that it provides for a fair balance of remedies. Specifically, in 1974, Congress amended TILA to permit private litigants, both as individuals and in class actions, to sue for any actual damages sustained "as a result" of a TILA violation. 15 U.S.C. § 1640(a)(1). In 1980, Congress further amended TILA, this time capping defendants' liability for statutory damages. TILA now provides that the ceiling on statutory damages in a class action applies to all class actions arising out of the same TILA violation. Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221 § 615(a)(1), 94 Stat. 132 (March 31, 1980).[5]

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[4] In other words, the enforcement agencies provide restitution to the victims of TILA violations, but this remedy is limited "if it would have a significantly adverse impact upon the safety or soundness of the creditor." 15 U.S.C. § 1607(e)(3)(A).

[5] Under TILA Section 1640(a)(2)(A)(i), Turner would be entitled to individual statutory damages equal to "twice the amount of any finance charge in connection with the transaction." However, as lead plaintiff in a class action, the entire range of statutory damages for the class are limited to: such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable,

Congress placed this ceiling on a defendant's statutory liability in a class action so that courts would no longer have to "choose between denying class actions altogether or permitting multi-million dollar recoveries against defendants for minor or technical violations." *McCoy v. Salem Mortgage Co.*, 74 F.R.D. 8, 10 (E.D.Mich.1976). Under this regime statutory damages provide at least a partial remedy for all material TILA violations; however, actual damages ensure that consumers who have suffered actual harm due to a lender's faulty disclosures can be fully compensated, even if the total amount of their harm exceeds the statutory ceiling on TILA damages. In this case we assume that the statutory ceiling has already been reached, and the sole issue presented is whether a plaintiff must show detrimental reliance on a faulty TILA disclosure in order to be eligible for an award of actual damages.

Most courts that have addressed the issue have held that detrimental reliance is an element in a TILA claim for actual damages. *See, e.g., Perrone v. General Motors Acceptance Corp.*, 232 F.3d 433, 436-40 (5th Cir.2000); *Stout v. J.D. Byrider*, 228 F.3d 709, 718 (6th Cir.2000); *Peters v. Jim Lupient Oldsmobile Co.*, 220 F.3d 915, 917 (8th Cir.2000); *Bizier v. Globe Financial Services, Inc.*, 654 F.2d 1, 4 (1st Cir.1981) (dicta); *Hoffman v. Grossinger Motor Corp.*, 1999 WL 184179, *4 (N.D.Ill.1999); *Brister v. All Star Chevrolet,*

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and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor;. . . . 15 U.S.C. § 1640(a)(2)(B).

986 F.Supp. 1003, 1008 (E.D.La.1997); *McCoy*, 74 F.R.D. at 12-13. This Circuit, however, has not joined the courts that have so held. *Ransom v. S & S Food Center, Inc. of Florida*, 700 F.2d 670, 677 (11th Cir.1983); *see also Lopez v. Orlor*, 176 F.R.D. 35, 40 (D.Conn.1997); *Sutliff v. County Sav. & Loan Co.*, 533 F.Supp. 1307, 1313 (N.D.Ohio 1982); *In re Russell*, 72 B.R. 855, 857 (Bankr.E.D.Pa.1987).

In *Ransom*, this Court affirmed the award of TILA actual damages to members of the plaintiff class who paid excessive finance charges but who had not alleged reliance. The plaintiff class in *Ransom* purchased food plans comprising a bulk food order and a service contract designated as a "Food Freezer Service Agreement" ("FFSA"). Although the FFSA provided warranties and services with respect to the food purchases, it also included a finance charge assessed whether the purchase was made with cash or by credit. 700 F.2d at 671-72. The trial court awarded the plaintiffs actual damages equal to the finance charge paid by each class member in excess of the legally permissible finance charge. In addition, the district court assessed statutory damages. Id. at 677. The *Ransom* Court rejected the defendant's contention that the plaintiffs could not show actual damages, noting that

> the record discloses that each of the members of the class had signed contracts which were illegal but upon which they were ostensibly liable and which had not been voluntarily cancelled by the defendants prior to the trial. It was therefore clearly appropriate for the trial court to require a payment to each of the named members of the class of a cash amount that would offset their

> outstanding obligations which would otherwise remain collectable against them.

Id.

It thus appears that the *Ransom* Court upheld the awarding of actual damages without requiring a showing of detrimental reliance, although the *Ransom* Court did not squarely address the issue, and it is not clear from the opinion that the issue was actually raised. However, notwithstanding *Ransom*, the district courts in this Circuit have imposed a detrimental reliance requirement for TILA actual damages claims. *See, e.g., Perry v. Household Retail Services, Inc.*, 180 F.R.D. 423, 433 (M.D.Ala.1998); *Barlow v. Evans*, 992 F.Supp. 1299, 1310 (M.D.Ala.1997); *Wiley v. Earl's Pawn & Jewelry*, 950 F.Supp. 1108, 1114-1117 (S.D.Ala.1997); *Adiel v. Chase Fed. Sav. & Loan*, 630 F.Supp. 131, 133 (S.D.Fla.1986), *aff'd*, 810 F.2d 1051 (11th Cir.1987). Complicating matters, this Court affirmed *Adiel* in *Adiel v. Chase Federal Savings & Loan*, 810 F.2d 1051 (11th Cir.1987), and several district courts in this Circuit treated this Court's affirmance of the district court's decision in *Adiel* as calling into question the continued viability of *Ransom*, despite the fact that *Ransom* was not discussed in this Court's opinion. *See Barlow*, 992 F.Supp. at 1309-10; *Wiley*, 950 F.Supp. at 1114-17.

Specifically, in *Adiel*, the plaintiff class consisted of homeowners who had adopted existing mortgages on the lots on which their homes were situated. The loans had been executed by the builder of the homes to Chase Federal Savings and Loan Association ("Chase"), and neither Chase nor the builder provided to the homeowners the required TILA disclosures. 630 F.Supp. at 132.

The plaintiffs urged the district court to follow *Ransom* and to award both actual and statutory damages, as the statute permits, but the district court required each member of the class to prove that "he or she would have gotten credit on more favorable terms but for the violation." Id. at 133 (quoting *McCoy*, 74 F.R.D. at 12). The district court also quoted approvingly language from a New York state court decision in which the state court required that a plaintiff claiming actual TILA damages must show "that he relied on the inaccurate disclosure and thereby was effectively prevented from obtaining better credit terms elsewhere." Id. (quoting *Vickers v. Home Fed. Sav. & Loan Assoc.*, 62 A.D.2d 1171, 1172, 404 N.Y.S.2d 201, 202 (1978)).

On appeal, the plaintiffs argued that the district court had erred in ruling that "to recover actual damages, each class member must show that but for the [TILA] violation, better credit on more favorable terms would have been obtained." *Adiel*, 810 F.2d at 1053. This Court affirmed the ruling of the district court, stating only that the district court "did not abuse its discretion in awarding statutory damages rather than actual damages." Id. at 1055. Therefore, the opinion did not address the issue of reliance. Indeed, in *Adiel* we only determined that the district court need not award actual damages when it has already provided a remedy through statutory damages and has taken into account, in considering the amount of statutory damages to award, the fact that no actual damages had been awarded. Id. at 1054-55.

However, in the Eleventh Circuit case most clearly relevant to the issue before us, this Court directly rejected a defendant's argument that a TILA claim for actual

damages fails if the plaintiff cannot demonstrate detrimental reliance on the defendant's misrepresentations. *Jones*, 212 F.3d at 1363 n. 7. The defendant car dealership in *Jones* led its customers to believe that they were paying $2,495 to the General Motors Corporation for an extended service contract. In fact only $290 went to General Motors, while the dealer kept $2,205 as an "upcharge." Id. at 1358-59. In *Jones*, this Court stated, "we reject Heard Chevrolet's contention that Plaintiff's TILA claim fails because Plaintiff cannot demonstrate reliance on its misrepresentations." Id. at 1363, n. 7.[6]

We now reconsider whether detrimental reliance is required for a TILA claim for actual damages. We note

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[6] The *Jones* Court relied on *Charles v. Krauss Co., Ltd.*, 572 F.2d 544, 546 (5th Cir.1978), to support this proposition. The *Charles* case is also considered part of the jurisprudence of this circuit. *See Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc) (indicating that the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981). On closer examination, we find that the opinion in *Charles* does not state whether the plaintiff sought actual or statutory damages. However, in stating that reliance is not a factor in TILA claims, the *Charles* Court cites to *McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir.1978). In *McGowan*, the Fifth Circuit notes that "[t]he basis of Section 1640(a) liability is the failure to disclose information required to be disclosed; there is no requirement that the plaintiff himself be deceived in order to sue in the public interest." Id. at 849. However, the *McGowan* Court also concludes that once such a failure to disclose is shown, "the court must award [the plaintiff] the statutory penalty,"and the Fifth Circuit awarded only statutory damages in that case. Id. at 849-50 (emphasis added). As shown, these cases additionally complicate the standard in the Eleventh Circuit for a TILA actual damages claim.

that the statute provides that a plaintiff is entitled only to "any actual damages sustained . . . as a result" of a TILA violation. 15 U.S.C. § 1640(a)(1). We find that this language indicates that the statute's authors intended that plaintiffs must demonstrate detrimental reliance in order to be entitled to actual damages under TILA. The legislative history behind the 1995 amendments to TILA supports our reading of the actual damages provision. It states:

> Section 130(a) of TILA allows a consumer to recover both actual and statutory damages in connection with TILA violations. Congress provided for statutory damages because actual damages in most cases would be nonexistent or extremely difficult to prove. To recover actual damages, consumers must show that they suffered a loss because they relied on an inaccurate or incomplete disclosure.

H.R. Rep. No. 193,104, 104th Cong., 1st Sess. (1995). The legislative history emphasizes that TILA provides for statutory remedies on proof of a simple TILA violation, and requires the more difficult showing of detrimental reliance to prevail on a claim for actual damages. To the extent that *Jones*, and possibly *Ransom*, hold otherwise, they are overruled. We hold that detrimental reliance is an element of a TILA claim for actual damages, that is a plaintiff must present evidence to establish a causal link between the financing institution's noncompliance and his damages.

CONCLUSION

For the foregoing reasons, the district court's denial of class certification on Turner's TILA claim for actual damages is

AFFIRMED.

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

January 3, 2001

NOTICE TO ALL COUNSEL OF RECORD

RE: 99-13381 – Turner v. Beneficial Corporation, et al.

Dear Counsel:

Enclosed is an order entered by the court directing that this case be reheard en banc. Under Eleventh Circuit Rule 35, the effect of granting rehearing en banc is to vacate the previous opinion and judgment of this court and to stay the mandate.

You will be notified by subsequent correspondence of the schedule for filing en banc briefs, the issue(s) which the court wishes the parties to focus on in their briefs, and the page limitations on them. We will also communicate with you at a later time regarding report time, location and time limitations on oral argument should the case be designated for oral argument.

Sincerely,

THOMAS K. KAHN, Clerk

By: /s/ Matt Davidson
Calendar Clerk

C. Know McLaney, III, Esq.
Burt M. Rublin, Esq.
Laurie Webb Daniel, Esq.
Clerk, U. S. District Court (MAL-Montgomery)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13381

D.C. Docket No. CV-95-01212

JACQUELINE TURNER, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

versus

BENEFICIAL CORPORATION, BENEFICIAL NATIONAL BANK USA,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

(Opinion December 21, 2000, ___ F.3d ___, 11th Cir., 2000)

(Filed January 3, 2001)

Before ANDERSON, Chief Judge, TJOFLAT, EDMONDSON, BIRCH, DUBINA, BLACK, CARNES,

BARKETT, HULL, MARCUS and WILSON, Circuit Judges.

BY THE COURT:

A member of this court in active service having requested a poll on whether rehearing should be granted, and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc.

IT IS ORDERED that the above cause shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13381

D.C. Docket No. CV-95-01212

JACQUELINE TURNER, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

versus

BENEFICIAL CORPORATION, BENEFICIAL NATIONAL BANK USA,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

---

(Filed Jan. 23, 2001)

ORDER:

Appellant's Motion Requesting Oral Argument Before the Court En Banc is Denied.

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals,
Eleventh Circuit.

Jacqueline TURNER, on behalf of herself and all others similarly situated, Plaintiff-Appellant,

v.

BENEFICIAL CORPORATION, Beneficial National Bank, U.S.A., Defendants-Appellees.

No. 99-13381.

Dec. 21, 2000.

Order Granting Rehearing En Banc and Vacating Opinion Jan. 3, 2001.

C. Knox McLaney, III, McLaney & Associates, PC, Montgomery, AL, for Plaintiff-Appellant.

Burt M. Rublin, Ballard, Spahr, Andrew & Ingersoll, Philadelphia, PA, for Defendants-Appellees.

Laurie Webb Daniel, Holland & Knight, Atlanta, GA, for Amicus Curiae, American Financial Services Ass'n and American Bankers Ass'n.

Appeal from the United States District Court for the Middle District of Alabama.

Before CARNES and BARKETT, Circuit Judges, and POLLAK*, District Judge.

BARKETT, Circuit Judge:

Jacqueline Turner brings this interlocutory appeal, pursuant to Federal Rule of Civil Procedure 23(f), from the denial of class certification in her suit alleging that

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* Honorable Louis H. Pollak, U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

defendant Beneficial Corporation ("Beneficial") committed violations of the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq. ("TILA"), and the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 et seq. ("RICO"), and also committed common law fraud in transactions related to its financing of Turner's purchase of a satellite dish.

BACKGROUND

This case arises out of Turner's purchase of a satellite dish system from Star Vision, Inc., prompted by a newspaper advertisement which indicated that monthly charges for service would be $39.95. The financing of the dish and the monthly service was to be provided through an agreement between Beneficial National Bank and Star Vision by way of an "Excel" credit card issued by Beneficial which could be used only to purchase goods and services from Star Vision. When the satellite system was delivered, the invoice reflected a monthly bill of $48.36, as did the Excel bill from Beneficial. With the Excel card, Turner had received TILA disclosure statements, but Turner alleges that these disclosures failed to reveal the true cost of financing the purchase of the satellite dish.[1]

Although Turner concedes that she did not read Beneficial's disclosure statements at the time of receipt and therefore did not rely on them, she claims that she is

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[1] Specifically, Turner contends that, pursuant to 15 U.S.C. § 1638, Beneficial should have disclosed: (1) the number of payments; (2) the amount of each monthly payment; (3) the amount financed; (4) the total finance charge; (5) the total of payments; and (6) the total sales price.

entitled to damages for Beneficial's failure to provide disclosure statements that complied with the requirements of the law under TILA. Specifically, Turner's complaint charged that Beneficial's failure to provide her with the correct disclosure forms violated TILA (Count I) and RICO (Count II) and constituted fraud by suppression (Count III). She sought certification of a nationwide class as to her TILA and RICO claims. She also sought certification of an Alabama subclass as to her fraud by suppression claim.

In Count I of her complaint, Turner sought both statutory and actual damages under TILA. The district court denied class certification on Turner's claim for statutory damages because Beneficial had already paid out the maximum allowable statutory damages in settlement of another suit arising out of the same TILA violation, and TILA bars any further class actions for statutory damages arising out of that same violation. *See* 15 U.S.C. § 1640(a)(2)(B). The district court noted that Turner can still pursue statutory damages on her individual TILA claim. Turner filed a separate appeal from the denial of class certification on her claim for TILA statutory damages, but she has since moved to voluntarily dismiss that appeal.

As to Turner's claim for actual damages under TILA, Beneficial did not dispute Turner's claim that the disclosures were improper. Instead it pointed out that, because Turner did not read the disclosure statement, she had not relied upon it and thus could not have suffered actual injury as a result of Beneficial's TILA violation. The district court found that detrimental reliance is a necessary element not only of her damage claim under

TILA but of her RICO and state fraud claims as well. Having determined that Turner could not prove reliance, the district court denied class certification on all three claims, and this appeal followed. We review class certification rulings for abuse of discretion. *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374 (11th Cir.1998) (en banc). We review de novo the district court's conclusions of law that informed its decision to deny class certification. *DeKalb County School Dist. v. Schrenko*, 109 F.3d 680, 687 (11th Cir.1997).

DISCUSSION

A court can certify a class only when the requirements of Rule 23(a) and at least one of the alternative requirements of Rule 23(b) are satisfied. *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir.1997). Turner maintains that all of the requirements of Rule 23(a) are satisfied[2] and that the class also satisfies Rule 23(b)(3), which requires that questions of law or fact common to all members of the class predominate over questions pertaining to individual members. The district court refused to certify a class on any of her causes of action because it found that Turner could not satisfy the typicality and adequacy requirements of Rule 23(a)(3) &

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[2] A class may be certified if the following requirements are met: (1) numerosity: the class is so numerous that joinder of all members is impracticable; (2) commonality: questions of law or fact are common to the class; (3) typicality: the representatives of the class present claims or defenses that are typical of the class; and (4) adequacy: the representatives of the class will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a).

(4) because she could not prove detrimental reliance. Thus, the issue in this appeal is whether detrimental reliance is a required element of a claim for actual damages under TILA, for a RICO claim, and for a fraudulent suppression claim under Alabama law. We discuss each in turn.

1. The TILA Claim

The TILA provision directly relevant to this case is that governing actual damages:

> Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to . . .
>
> (1) any actual damage sustained by such person as a result of the failure;. . . .

15 U.S.C. § 1640(a)(1) (1998). This provision must be understood in the context of TILA's general regulatory scheme.

In addition to actual damages, TILA provides three ways of remedying violations of its provisions. First, TILA empowers the Federal Trade Commission as its overall enforcement agency, 15 U.S.C. § 1607(c), and provides other federal agencies with enforcement authority over specific categories of lenders. 15 U.S.C. § 1607(a). The enforcing agencies are authorized to "adjust the account of the person to whom credit was extended, to assure that such person will not be required to pay a finance charge in excess of the finance charge actually

disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower." 15 U.S.C. § 1607(e)(1).[3] Second, TILA imposes criminal liability on persons who willfully and knowingly violate the statute. 15 U.S.C. § 1611. Finally, TILA creates a private cause of action for statutory damages, which may be assessed in addition to any actual damages awarded.

When TILA was originally enacted in 1968, it imposed no limit on statutory damages in class actions and required that each successful plaintiff be awarded a minimum of $100 in damages. Consumer Credit Protection Act of 1968, Title I, § 206(a), Pub.L. No. 90-321, 82 Stat. 146 (May 29, 1968). Congress amended TILA's statutory damages provision in 1974 in order to "strike an appropriate balance between the advantages of the class action as a vehicle of private enforcement and the need of creditors to avoid financial ruin." *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 223 (4th Cir.1978). Congress further capped defendants' liability for statutory damages by providing that the ceiling on statutory damages in a class action applies to all class actions arising out of the same TILA violation. Truth in Lending Simplification and Reform Act of 1980, Pub.L. No. 96-221 § 615(a)(1), 94 Stat. 168 (March 31, 1980). In the case of a class action, statutory damages are now limited to:

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[3] In other words, the enforcement agencies provide restitution to the victims of TILA violations, but this remedy is limited "if it would have a significantly adverse impact upon the safety or soundness of the creditor." 15 U.S.C. § 1607(e)(3)(A).

> such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor;. . . .

15 U.S.C. § 1640(a)(2)(B).[4] Congress placed this ceiling on a defendant's statutory liability in any class action so that courts would no longer have to "choose between denying class actions altogether or permitting multi-million dollar recoveries against defendants for minor or technical violations." *McCoy v. Salem Mortgage Co.*, 74 F.R.D. 8, 10 (E.D.Mich.1976).

While limiting statutory damages, Congress also amended TILA in 1974 to permit private litigants, both as individuals and in class actions, to sue for actual damages sustained "as a result" of the TILA violation. 15 U.S.C. § 1640(a)(1). While statutory and regulatory damages provide at least a partial remedy for all material TILA violations, actual damages insure that consumers who have suffered actual harm due to a lender's faulty disclosures can be fully compensated, even if the total amount of their harm exceeds the statutory ceiling on TILA damages. In this case we take it that the statutory ceiling has already been reached, and the sole issue presented is whether a plaintiff must show detrimental reliance on a

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[4] Under TILA Section 1640(a)(2)(A)(i), Turner would be entitled to individual statutory damages equal to "twice the amount of any finance charge in connection with the transaction."

faulty TILA disclosure in order to be eligible for an award of actual damages. There is a conflict among various courts on this issue. Most courts that have addressed the issue have held that reliance is an element in a TILA claim for actual damages. *See,* e.g., *Perrone v. General Motors Acceptance Corp.*, 232 F.3d 433, 436-40 (5th Cir.2000); *Stout v. J.D. Byrider,* 228 F.3d 709, 718 (6th Cir.2000); *Peters v. Jim Lupient Oldsmobile Co.*, 220 F.3d 915, 917 (8th Cir.2000); *Bizier v. Globe Financial Serv., Inc.*, 654 F.2d 1, 4 (1st Cir.1981) (dicta); *Hoffman v. Grossinger Motor Corp.*, 1999 WL 184179, *4 (N.D.Ill.1999); *Brister v. All Star Chevrolet, Inc.*, 986 F.Supp. 1003, 1008 (E.D.La.1997); *McCoy,* 74 F.R.D. at 12-13. This Circuit is aligned with the minority of courts that have reached the opposite conclusion. *Ransom v. S & S Food Center, Inc. of Florida,* 700 F.2d 670 (11th Cir.1983); *see* also *Lopez v. Orlor,* 176 F.R.D. 35 (D.Conn.1997); *Sutliff v. County Sav. & Loan Co.*, 533 F.Supp. 1307 (N.D.Ohio 1982); *In re Russell,* 72 B.R. 855 (Bankr.E.D.Pa.1987).

In *Ransom,* the court affirmed the award of TILA actual damages to members of the plaintiff class who paid excessive finance charges but who had not alleged reliance. The plaintiff class in *Ransom* purchased food plans comprising a bulk food order and a service contract designated as a "Food Freezer Service Agreement" ("FFSA"). Although the FFSA provided warranties and services with respect to the food purchases, it also included a finance charge assessed whether the purchase was made with cash or by credit. Id. at 671-72. The trial court found that the plaintiffs had suffered actual damages equal to the finance charge paid by each class member in excess of the legally permissible finance charge. In

addition, the district court assessed statutory damages. Id. at 677. The *Ransom* Court rejected the defendant's contention that the plaintiffs could not show actual damages, noting that

> the record discloses that each of the members of the class had signed contracts which were illegal but upon which they were ostensibly liable and which had not been voluntarily cancelled by the defendants prior to trial. It was therefore clearly appropriate for the trial court to require a payment to each of the named members of the class of a cash amount that would offset their outstanding obligations which would otherwise remain collectable against them.

Id.

Notwithstanding *Ransom*, the district courts in this Circuit have imposed a reliance requirement. *See e.g., Perry v. Household Retail Serv., Inc.*, 180 F.R.D. 423, 433 (M.D.Ala.1998); *Barlow v. Evans*, 992 F.Supp. 1299, 1310 (M.D.Ala.1997); *Wiley v. Earl's Pawn & Jewelry, Inc.*, 950 F.Supp. 1108, 1114-1117 (S.D.Ala.1997); *Adiel v. Chase Fed. Sav. & Loan, Ass'n*, 630 F.Supp. 131, 133 (S.D.Fla.1986), *aff'd*, 810 F.2d 1051 (11th Cir.1987). Several district courts in this Circuit have treated this Court's affirmance of *Adiel* as calling into question the continued viability of *Ransom*. *See Barlow*, 992 F.Supp. at 1309-10; *Wiley*, 950 F.Supp. at 1114-17. Beneficial likewise urges that, to the extent that *Ransom* supports the proposition that a plaintiff need not show detrimental reliance in order to sustain a TILA claim for actual damages, it has been overruled by *Adiel*. First, we note that a second panel of this Court cannot overrule a prior panel. *See Cohen v. Office Depot*,

Inc., 204 F.3d 1069, 1076 (11th Cir.2000); *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir.1993). Second, we do not find that *Adiel* attempted to overrule or even distinguish *Ransom*.

In *Adiel*, the plaintiff class consisted of homeowners who had adopted existing mortgages on the lots on which their homes were situated. The loans had been executed by the builder of the homes to Chase Federal Savings and Loan Association ("Chase"), and neither Chase nor the builder provided to the homeowners the required TILA disclosures. 630 F.Supp. at 132. The plaintiffs urged the district court to follow *Ransom* and to award both actual and statutory damages, but the district court required each member of the class to prove that "he or she would have gotten credit on more favorable terms but for the violation." Id. at 133 (quoting *McCoy*, 74 F.R.D. at 12). The district court also quoted approvingly language from a New York State court decision in which the state court required that a plaintiff claiming actual TILA damages must show "that he relied on the inaccurate disclosure and thereby was effectively prevented from obtaining better credit terms elsewhere." Id. (quoting *Vickers v. Home Federal Sav. & Loan Ass'n of East Rochester*, 62 A.D.2d 1171, 1172, 404 N.Y.S.2d 201, 202 (1978)).

On appeal, the plaintiffs argued that the district court had erred in ruling that "to recover actual damages, each class member must show that but for the [TILA] violation, better credit on more favorable terms would have been obtained." *Adiel*, 810 F.2d at 1053. This Court affirmed the ruling of the district court, stating only that the district court "did not abuse its discretion in awarding statutory damages rather than actual damages." Id. at

1055. The opinion did not address the issue of reliance. *Adiel* only determined that the district court need not award actual damages when it has already provided a remedy through statutory damages and has taken into account, in considering the amount of statutory damages to award, the fact that no actual damages had been awarded. Id. at 1054-55.

More relevantly, in *Jones v. Bill Heard Chevrolet, Inc.*, 212 F.3d 1356 (11th Cir.2000), this Court directly rejected a defendant's argument that a TILA claim for actual damages fails if the plaintiff cannot demonstrate reliance on the defendant's misrepresentations. The defendant car dealership in *Jones* led its customers to believe that they were paying $2,495 to the General Motors Corporation for an extended service contract.In fact only $290 went to General Motors, while the dealer kept $2,205 as an "upcharge." Id. at 1358-59. In *Jones*, the Court stated, "we reject Heard Chevrolet's contention that Plaintiff's TILA claim fails because Plaintiff cannot demonstrate reliance on its misrepresentations." Id. at 1363, n. 7 (citing *Charles v. Krauss Co., Ltd.*, 572 F.2d 544, 546 (5th Cir.1978)).[5] The opinion in *Charles* does not state whether the plaintiff sought actual or statutory damages, but in stating that reliance is not a factor in TILA claims, *Charles* cites to *McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir.1978). *McGowan* noted that "[t]he basis of Section 1640(a) liability is the failure to disclose information required to be

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[5] In *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

disclosed; there is no requirement that the plaintiff himself be deceived in order to sue in the public interest." Id. at 848-49. However, the *McGowan* Court also concluded that once such a failure to disclose is shown, "the court must award [the plaintiff] the statutory penalty." Id. at 849 (citing *Grant v. Imperial Motors*, 539 F.2d 506, 510-11 (5th Cir.1976) (emphasis added)), and the Fifth Circuit awarded only statutory damages in that case. Id. at 850.

Beneficial argues that the *Jones* Court erred in relying on case law relating to claims for statutory damages under TILA in finding that there is no requirement that a plaintiff demonstrate detrimental reliance in order to be entitled to actual TILA damages. We agree with Beneficial, and with the other Courts of Appeal that have addressed the issue, that the plain language of TILA's actual damages provision requires a showing of detrimental reliance as part of any claim for actual TILA damages.[6] However, we are bound by the holding of the first panel of this Court to address an issue of law, unless and until that holding is overruled en banc or by the Supreme Court. *Hogan*, 986 F.2d at 1369. As we recently noted,

> the prior panel precedent rule is not dependent upon a subsequent panel's appraisal of the initial decision's correctness. Nor is the operation

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[6] The legislative history behind the 1995 amendments to TILA lends further support to our reading of the actual damages provision: "To recover actual damages, consumers must show that they suffered a loss because they relied on an inaccurate or incomplete disclosure." H.R.REP. NO. 193, 104 CONG., 1ST SESS. (1995).

> of the rule dependent upon the skill of the attorneys or wisdom of the judges involved with the prior decision – upon what was argued or considered. Unless and until the holding of a prior decision is overruled by the Supreme Court or by the en banc court, that holding is the law of this Circuit regardless of what might have happened had other arguments been made to the panel that decided the issue first.

Cohen, 204 F.3d at 1076.

In any case, while the Fifth Circuit precedents upon which *Jones* relies may not clearly apply to a case involving TILA actual damages, *Jones* does. Under *Jones*, the law of this Circuit does not require that a plaintiff asserting a claim for actual damages under TILA demonstrate reliance. This panel is convinced that, to the extent that *Jones*, and possibly *Ransom*, so hold, they are wrongly decided, and this should be rectified by the en banc Court. Until that occurs, however, we are bound to follow the law of this Circuit. Accordingly, we find that the district court erred in holding that detrimental reliance is an element of a TILA claim for actual damages.

2. The RICO Claim

In Count II of her complaint, Turner alleged that the crime underlying her RICO claim was a pattern of mail and wire fraud in violation of 18 U.S.C. §§ 1341 & 1343. A plaintiff alleging mail or wire fraud as the predicate act for a RICO violation must show not only that the mail or wire fraud statutes have been violated but that he has "suffered injury as a result of the violation." *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir.1991). The *Pelletier*

Court noted that the Supreme Court requires that a civil RICO plaintiff must show that he or she was injured by reason of the defendant's acts of deception. *Id.* (citing *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985)). Moreover, as we stated in *Pelletier*, this Circuit has held

> that a plaintiff has standing to sue under section 1964(c) only if his injury flowed directly from the commission of the predicate acts. This means that, when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme.

921 F.2d at 1499-1500 (internal citation omitted). This substantive requirement applies to class actions. *Andrews v. AT&T Co.*, 95 F.3d 1014, 1023-25 (11th Cir.1996). Accordingly, we conclude that the district court did not err in finding that reliance is an element of a RICO claim and in denying class certification on that basis.

3. The State Fraud Claim

In order to establish a claim for fraudulent suppression, Turner must show that Beneficial knowingly suppressed a material fact that it had a duty to disclose and that, as a result of that suppression, Turner was induced to act or to refrain from acting, suffering damage as a proximate result. *Ex parte Household Retail Serv., Inc.*, 744 So.2d 871, 879 (Ala.1999). *See also, McGriff v. Minnesota Mut. Life Ins. Co.*, 127 F.3d 1410, 1415 (11th Cir.1997) ("Under Alabama law, to succeed on a claim of fraudulent suppression, [plaintiff] must show that [defendant]

failed to disclose a material fact, thereby creating a false impression on which [plaintiff] relied, believing it to be true, which proximately caused damages.").

In a recent case involving a fraud by suppression claim, the Alabama Supreme Court stated that the duty to disclose, "applicable in the case alleging suppression, is analogous to the element of reliance applicable in the case alleging a misrepresentation." *Ex parte Gov't Employees Ins. Co.*, 729 So.2d 299, 305 (Ala.1999). Turner argues that this statement means that she can establish her fraud by suppression claim without showing reliance, so long as she can establish that Beneficial breached its duty to disclose. However, the Alabama Supreme Court has since clarified that a plaintiff's "justifiable reliance" is an essential element of a fraudulent suppression claim. *Household Retail Serv.*, 744 So.2d at 879. As Turner cannot demonstrate that she relied on Beneficial's faulty disclosure statements, we conclude that the district court correctly found that Turner cannot satisfy Rule 23's typicality and adequacy requirements.

CONCLUSION

For the foregoing reasons, the district court's denial of class certification on Turner's RICO and fraud by suppression claims is AFFIRMED. The order of the district court, denying class certification on Turner's TILA actual damages claim is VACATED, and the case is REMANDED for further consideration in light of this opinion.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Before ANDERSON, Chief Judge, and TJOFLAT, EDMONDSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS and WILSON, Circuit Judges.

ORDER

Jan. 3, 2001.

BY THE COURT:

A member of this court in active service having requested a poll on whether rehearing should be granted, and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this court en banc. The previous panel's opinion is VACATED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-90019-F

JACQUELINE TURNER,

Petitioner,

versus

BENEFICIAL CORPORATION,
BENEFICIAL NATIONAL BANK U.S.A.,

Respondents.

On Petition for Permission to Appeal from the United States District Court for the Middle District of Alabama

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(Filed Sep. 13, 1999)

BEFORE: COX, BLACK and BARKETT, Circuit Judges.

BY THE COURT:

Jacqueline Turner's petition for permission to appeal pursuant to Rule 23(f) F.R.C.P. is GRANTED. Proceedings in the district are not stayed by this court.

Supreme Court, U.S.
FILED

No. 001799 MAY 22 2001

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JACQUELINE TURNER, on behalf of herself and all others similarly situated,

Petitioner,

v.

BENEFICIAL CORPORATION, BENEFICIAL NATIONAL BANK, USA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JACQUELINE TURNER, et al., Plaintiffs, v. BENEFICIAL CORPORATION and BENEFICIAL NATIONAL BANK, USA, Defendants.	)	CIVIL ACTION NO. 95-A-1212-N (Filed Jul. 27, 1999)

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Before the court is a Motion for Class Certification filed by the Plaintiff on May 14, 1999. The Plaintiff, Jacqueline Turner, originally filed her Complaint in this case on September 15, 1995. She filed an Amended Complaint on January 22, 1998. Turner alleges that Defendants Beneficial Corporation and Beneficial National Bank, USA (collectively "Beneficial") engaged in "unfair and deceptive practices in connection with the financing of satellite dishes and other durable goods costing $2,000 or more." Am. Compl. ¶ 1. More specifically, Turner contends that the Defendants deprived unsophisticated consumers of relevant information to which they were entitled under the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* ("TILA").

The Plaintiff brings three counts on behalf of herself and those similarly situated. In Count I of the Amended

Complaint, Ms. Turner asserts that Beneficial violated provisions of the TILA "[b]y employing open-end credit disclosures with respect to transactions not legitimately classifiable as open-end." Am. Compl. ¶ 49. She requests judgment in favor of the plaintiff and the class awarding statutory damages, actual damages, attorney's fees and litigation expenses, and other costs. *See id.* ¶ 51. In Count II, Ms. Turner contends that, by issuing its private label credit cards to disguise closed-end credit transactions as open-end credit transactions, Beneficial implemented a scheme to defraud through a pattern of mail and wire fraud in violation of RICO. *Id.* ¶¶ 56, 57. In Count III, Ms. Turner accuses Beneficial of Fraud by Suppression under Alabama law in failing to disclose the nature of the credit for which plaintiffs and class members applied, the cost of the credit, and other information required for closed-end transactions. *Id.* ¶¶ 63-65.

For the two federal claims, Ms. Turner seeks certification of a nationwide class consisting of those persons satisfying the following criteria:

> a. They entered into a consumer credit transaction with a merchant whose business was the selling of "non-recurring sale items" which was financed by Beneficial Corporation and/or Beneficial National Bank, USA.
>
> b. The line of credit authorized in the transaction was set at an amount no more than $300 more than the amount of the cost of the transaction.
>
> c. The transactions occurred within (i) one year prior to the filing of this complaint for purposes

> of the TILA claim, (ii) and, four years for the purposes of RICO.

Motion for Class Certification (File Doc. 87) ¶ 1. For the fraud by suppression claim, Turner seeks certification of an Alabama subclass consisting of persons whose transactions occurred within two years prior to filing of this complaint. *See id.*

For reasons to be discussed, Plaintiff's Motion for Class Certification is due to be DENIED in part.

II. STANDARD FOR CLASS CERTIFICATION

The question of class certification is a procedural one distinct from the merits of the action. *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).[1] In deciding whether to certify a class, a district court has broad discretion. *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566 (11th Cir. 1992). Although a district court is not to determine the merits of a case at the certification stage, sometimes "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Washington*, 959 F.2d at 1560 n.11.

A class action may only be certified if the court is satisfied, after a rigorous analysis, that the prerequisites of Federal Rule of Civil Procedure 23 have been satisfied. *Gilchrist v. Bolger*, 733 F.2d 1551, 1555 (11th Cir. 1984). "A class action may be maintained only when it satisfies all the requirements of Fed. R. of Civ. Pro. 23(a) and at least

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[1] In *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent the decisions of the former Fifth Circuit.

one of the alternative requirements of Rule 23(b)." *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997). A court must evaluate whether the four requirements of Rule 23(a) are met: numerosity, commonality, typicality, and adequacy of representation. Furthermore, the court must determine whether the action may be maintained as one of the classes under Rule 23(b). The party seeking to maintain the class action bears the burden of demonstrating that all prerequisites to class certification have been satisfied. *Walker v. Jim Dandy Co.*, 747 F.2d 1360, 1363 (11th Cir. 1984).

III. FACTS

The submission of the parties establish the following facts:

Jacqueline Turner is a resident of Union Springs, Alabama. On or about February 9, 1995, Ms. Turner responded to an advertisement in the Union Springs Herald placed by Star Vision, Inc. for the purpose of soliciting satellite system sales.[2] Ms. Turner decided to purchase a satellite system, and she gave credit application information over the phone. An employee of Star Vision installed a satellite dish at Ms. Turner's home on or about February 9, 1995. An invoice from Star Vision indicated a total price of $3,224.00 with a notation of "$48.36/month." Turner contends that she was informed

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[2] Star Vision, Inc. was originally named as a defendant in this case. The court dismissed the claims against Star Vision without prejudice after receiving notice that Star Vision had filed for bankruptcy.

she would have to pay $39.95 per month, but she was required to pay $48 per month. Turner Dep. at 63-64.

Subsequently, Ms. Turner received an "Excel" card. The "Excel" card which Ms. Turner received was a private label credit card issued by Beneficial, pursuant to an agreement between Beneficial and Star Vision. The card could only be used to purchase goods and services from Star Vision. Ms. Turner contends that she was not provided any information which would lead her to believe that she had applied for a credit card. Ms. Turner began receiving monthly bills from Defendant Beneficial requiring a minimum payment of approximately $50.00.

The Cardholder Agreement and Disclosure Statement for the "Excel" card contains TILA disclosures applicable to "open end" credit transactions. Ms. Turner contends that Beneficial should have disclosed the following items of information required to be disclosed in closed-end credit transactions: (1) the number of payments; (2) the amount of each monthly payment; (3) the amount financed; (4) the total finance charge; (5) the total of payments; and (6) the total sales price. In deposition testimony, Turner stated that she had never read the cardholder agreement or disclosure statement. Turner Dep. at 38-39. Ms. Turner alleges that she and other class members relied on the disclosures to their detriment in that they were not given accurate costs of financing, they were denied the opportunity to accurately compare terms of financing, they were prevented from entering a more favorable financing arrangement, and they paid more for the satellite system under open-end credit than they would have paid under closed-end credit. Am. Compl. ¶¶ 50, 61, 67.

IV. DISCUSSION

Federal Rule of Civil Procedure 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Plaintiff asserts that the class exceeds 1,000 persons, there are common questions of law or fact which predominate over any individual questions, and Ms. Turner will fairly and adequately protect the interests of the class because she has been a victim of the Defendants' unfair and deceptive practices. Ms. Turner identifies the common questions of law as: (1) whether it is a violation of TILA to classify as "open end" credit transactions in the financing of large-ticket durable goods; (2) whether the mailing of form documents in connection with the issuance of financing of said items constitutes mail fraud; (3) whether Beneficial conducted or participated in the conduct of the affairs of an enterprise through a pattern of mail fraud, in violation of 18 U.S.C. § 1962(c); and (4) whether the failure to provide closed end credit disclosures in the circumstances alleged constitutes fraud by suppression under Alabama law.

Central to the Plaintiffs' motion is her contention that proof of detrimental reliance is not an element of her

claims. In a series of recent decisions, this court and other courts in this district have held otherwise. *See Cooks v. American General Financial Center*, No. 95-A-1213-N (M.D. Ala. Jan. 13, 1999); *Ferry v. Household Retail Services, Inc.*, 180 F.R.D. 423 (M.D. Ala. 1998); *Mack v. General Motors Acceptance Corp.*, 169 F.R.D. 671 (M.D. Ala. 1996).

The plaintiffs in both *Cooks* and *Perry* asserted class claims arising from the use of private label credit cards, with TILA disclosures for open-end credit transactions, to finance satellite dish purchases. In *Cooks*, this court adopted Magistrate Judge McPherson's recommendation denying class certification for fraudulent suppression claims under Alabama law. The court found that the named plaintiffs did not satisfy the typicality requirement of Rule 23(a). *See Cooks*, No. 95-A-1213-N (M.D. Ala. Jan. 13, 1999) at 11. The plaintiffs sought to represent a class of persons who relied on the provision of improper credit disclosures, yet the named plaintiffs testified that they relied on representations from a salesperson rather than any disclosures in the documents. *See id.* at 12-14.

Judge McPherson noted that reliance is an element of fraudulent suppression under Alabama law. *See id.* at 7-8 (quoting *Ford New Holland v. Proctor-Russell Tractor Co.*, 630 So. 2d 395, 399 (Ala. 1993)). This court affirmed its earlier ruling when it denied the plaintiffs' motion to reconsider. *See Cooks v. American General Financial Center*, No. 95-A-1213-N (M.D. Ala. Jul. 14, 1999). The plaintiffs asserted that a recent Alabama Supreme Court decision, *Ex Parte Government Employees Ins. Co.*, 729 So. 2d 299 (Ala. 1999), removed the need for a plaintiff to prove reliance in a fraud by suppression claim. This court maintained that "there must be a showing by each plaintiff

that he or she relied upon, or was induced to act by, suppression of a fact in order to prevail on a fraudulent suppression claim." *Cooks v. American General Financial Center*, No. 95-A-1213-N, at 3 (M.D. Ala. Jul. 14, 1999). Furthermore, the court stated, "Separate from any difficulties posed by proving the element of duty to disclose, this court finds, that the factual issues which would be involved in proving the requirement of reliance, or inducement to act, precludes class certification in this case." *Id.*

In *Perry*, Judge DeMent adopted the recommendation of Magistrate Judge Carroll, granting in part and denying in part a motion for class certification. As in the case presently before the court, the plaintiffs sought certification of a nationwide class for federal claims under TILA and RICO, and certification of an Alabama subclass for a state law claim of fraud. The evidence before the court reflected that neither the plaintiff nor his daughter, who was substituted as plaintiff after her father died, relied on the written credit disclosures in the documents at issue. The father died before his deposition could be taken, and the daughter asserted that she had neither seen nor read the Credit Agreement. *See Perry*, 180 F.R.D. at 433.

The court certified a class with respect to the claim for statutory damages under the TILA, but denied certification with respect to the claims for actual damages under the TILA, violation of RICO, and state law fraud. *See id.* at 427, 437. Judge Carroll found that, as to the latter claims, the plaintiffs could not satisfy the typicality and adequacy of representation requirements because they had not relied on the written disclosures at issue. The court noted that a plaintiff claiming actual damages

for violation of the TILA must establish a causal connection between the inaccurate disclosure and his injury "by demonstrating that he relied on the inaccurate disclosure." *Id.* at 433 (quoting *Adiel v. Chase Federal Savings & Loan Ass'n*, 630 F. Supp. 131, 133 (S.D. Fla. 1986), *aff'd*, 810 F.2d 1051 (11th Cir. 1987)).

Similarly, the court noted that when a RICO violation is predicated on mail or wire fraud, "the plaintiff must have been the target of the scheme to defraud and must have relied to his detriment on the misrepresentations made in furtherance of that scheme." *Id.* at 434 (quoting *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir.), *cert. denied*, 502 U.S. 855, 112 S.Ct. 167, 116 L.Ed.2d 131 (1991)). As to the fraud claim, the court noted that reliance is an element of fraud by suppression under Alabama law in that the plaintiff must show the suppression had some effect on his action or inaction. *See id.* at 435.

The plaintiffs in the present case simply rehash arguments which this court and other courts in this district have found unpersuasive. Despite the plaintiffs protestations to the contrary, this court holds that reliance is a necessary element of the Plaintiff's claims for actual damages under the TILA, violation of RICO, and fraud by suppression under Alabama law. A recent Eleventh Circuit case does not, as the Plaintiff suggests, negate the element of reliance for RICO claims predicated on mail or wire fraud. *See All Care Nursing Service, Inc. v. High Tech Staffing Services, Inc.*, 135 F.3d 740, 745 n.10 (11th Cir. 1998) ("Reliance is only an element of a RICO claim to the extent that a RICO plaintiff must prove he was injured by reason of the RICO defendant's deception and fraud.").

Ms. Turner acknowledged in deposition testimony that she did not read the cardholder agreement or disclosure statement containing the allegedly improper disclosures. Therefore, she cannot prove that she relied to her detriment on the written disclosures. Given the factual similarity between Ms. Turner's claims and those of the plaintiffs in *Cooks* and *Perry*, this court chooses to follow the reasoning of those cases. Accordingly, Ms. Turner cannot satisfy the typicality and adequacy of representation requirements in Rule 23(a) for her claims of actual damages under the TILA, violation of RICO, and fraud by suppression under Alabama law. Class certification for those claims is inappropriate.

The only remaining claim to be considered is Turner's claim for statutory damages under the TILA. If Defendants violated the TILA by providing improper disclosures, as alleged by the Plaintiff, they may be held liable for actual and statutory damages. *See* 15 U.S.C. § 1640. In *Perry*, the court certified a class under Rule 23(b)(3) for a claim of TILA statutory damages. The court noted that "the state of mind of the creditor . . . is the focus of a court in determining whether a plan is improperly characterized as open ended." *Perry*, 180 F.R.D. at 432. Thus, to establish a violation of the TILA, a plaintiff need not prove her own reliance on the defendant's conduct. *See id.*

Because the statutory damages inquiry focuses on the defendants' practices rather than the plaintiff's state of mind, in contrast to the actual damages inquiry, class treatment was appropriate. *See id.* The plaintiff was a participant in the scheme which allegedly violated the TILA, which was sufficient to render her an adequate

representative and her father's claim typical for purposes of determining TILA liability. *See id.* at 433. The court found that the plaintiff established the two essential requirements under Rule 23(b)(3)-predominance and superiority. *See id.* at 436. A TILA statutory damages claim focuses simply on whether the disclosures made in the credit card program violate the TILA. Because there was no dispute concerning the content of the disclosures and the disclosures were common to all class members, class questions predominated and the class action was a superior way to determine liability. *See id.*

Like the plaintiff in *Perry*, Ms. Turner was a participant in the Defendants' scheme which she alleges violated the TILA. Thus, she could fairly and adequately represent a class for the purposes of establishing TILA liability and a right to statutory damages. Defendants contend, however, that it paid the maximum allowable statutory damages in settlement of a prior class action premised on the same TILA claim. In August 1997, Beneficial entered into a settlement with a settlement class comprised of all persons in Alabama who bought satellite dishes with credit card financing provided by Beneficial, except those individuals who had a financed purchase reversed or, like Ms. Turner, had filed suit against Beneficial prior to July 11, 1997.

One paragraph in the stipulation of settlement provided as follows:

> 25. **EFFECT OF OPEN END DISCLOSURES.** Plaintiff expressly acknowledges and agrees that the aggregate Class Relief to which Class Members would have been entitled would have been reduced by not less than $500,000 if Beneficial

> had timely provided closed end disclosures to Class Members pursuant to the federal Truth in Lending Act and Regulation Z thereunder. Beneficial denies, however, that it has violated the Truth-in Lending Act.

Defendants' Memorandum in Opposition to Plaintiff's Motion for Class Certification (File Doc.94), Exhibit A, at p. 21 ¶ 25. The trial court gave final approval to the settlement and ordered that consummation proceed as described in the Stipulation. *See Johnson v. Beneficial Nat'l Bank, USA*, No. 97-120 (Cir. Ct. Marengo County, Ala., Nov. 17, 1997), Defendants' Exhibit B. Subsequently, the trial court entered an order enforcing its final judgment, finding that Ms. Turner's prior federal court action did not strip the state court of jurisdiction. *See Johnson v. Beneficial Nat'l Bank, USA*, No. 97-120 (Cir. Ct. Marengo County, Ala., July 6, 1998), Defendants' Exhibit B. The Alabama Supreme Court affirmed the trial court without opinion. *See Beneficial Nat'l Bank, USA v. Johnson*, No. 1971822 (Ala. Mar. 26, 1999), Defendants' Exhibit B.

Defendants assert that the state court settlement precludes any claim for statutory damages under the TILA. With regard to statutory damages, the TILA provides, "[T]he total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor." 15 U.S.C. § 1640(a)(2)(B). Defendants contend that they paid the maximum statutory damages allowed in the state court settlement, and Ms. Turner's class action arises out of the "same failure to comply by the same creditor." Plaintiff, who requests

certification under Rule 23(b)(3), asserts that this court is not bound by the state court order, which certified a settlement class under Rule 23(b)(2).

The court believes that it must determine the viability of Ms. Turner's claim for statutory damages before certifying a class for that claim under Rule 23(b)(3). Defendants' argument concerning the preclusive effect of the state court settlement, however, should be raised in a motion for summary judgment supported by evidence and brief. Accordingly, the court will delay ruling on the certification of a class for the TILA statutory damages claim until the parties have addressed the viability of such a claim through a motion for summary judgment.

V. CONCLUSION

For the reasons stated above, it is hereby ORDERED as follows:

1. Plaintiffs Motion for Class Certification is DENIED with respect to her claims for actual damages under the TILA, violation of RICO, and fraud by suppression under Alabama law.

2. Defendants shall have until August 10, 1999 to file a Motion for Summary Judgment, with accompanying evidence and brief, addressing the viability of Plaintiff's claim for statutory damages under the TILA. Plaintiff shall have until August 24, 1999 to respond. Defendants shall have until August 31, 1999 to reply. The motion will be taken under submission on that day for determination without oral hearing.

DONE this 27th day of July, 1999.

/s/ W. Harold Albritton
W. HAROLD ALBRITTON
CHIEF UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUL 5 2001
OFFICE OF THE CLERK

No. 00-1799

In The

Supreme Court of the United States

JACQUELINE TURNER,

Petitioner,

v.

BENEFICIAL CORPORATION,
BENEFICIAL NATIONAL BANK USA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether detrimental reliance must be proven to recover actual damages for an alleged disclosure violation arising under the Truth in Lending Act ("TILA"), 15 U.S.C. §§1601, *et seq.*

2. Whether detrimental reliance must be proven to recover damages in a civil RICO action predicated on alleged mail and wire fraud.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding. The ultimate corporate parent of respondents Beneficial Corporation and Beneficial National Bank USA is Household International, Inc., which is a publicly-held company.

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COUNTERSTATEMENT OF THE CASE

While denial of the petition for a writ of certiorari (the "Petition") does not depend upon factual matters, Respondents offer this Counterstatement of the Case to apprise the Court of certain significant facts that were omitted from Petitioner's Statement of the Case.

Most significantly, Petitioner fails to mention that it is undisputed that she did not even read, much less rely upon, the allegedly deficient TILA disclosure statements that were given to her. As the Eleventh Circuit observed, "Turner concedes that she did not read Beneficial's disclosure statements at the time of receipt and therefore did not rely on them." (Pet. App. 3-4; 19).

In addition, Petitioner is wrong in arguing that Respondents' disclosures violated TILA and that "Beneficial did not dispute Turner's claim that the disclosures were improper." Petition at p. 8. To the contrary, Respondents have always maintained throughout this litigation that it was proper under TILA to provide Petitioner with the disclosures applicable to open-end, rather than closed-end, credit transactions.

Also, Petitioner's recitation of the proceedings in the Eleventh Circuit is incomplete. In its December 21, 2000 opinion, the panel unanimously concluded that, based on the Eleventh Circuit's earlier decision in *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991), a plaintiff alleging a violation of Section 1964(c) of RICO that is predicated on mail or wire fraud must show detrimental reliance on the alleged misrepresentations. (Pet. App. 30-31).

On the TILA claim, the panel stated that "[w]e agree with Beneficial, and with the other Courts of Appeal that have addressed the issue, that the plain language of TILA's actual damages provision requires a showing of detrimental reliance as part of any claim for actual TILA damages." (Pet. App. 29). However, it stated that it was "bound" by an earlier panel decision in another case that had refused to impose a reliance requirement for TILA actual damages. (Pet. App. 30). The panel stressed that, in its view, the earlier panel decision was "wrongly decided, and this should be rectified by the *en banc* Court." (Pet. App. 30).

Two weeks later, on January 3, 2001, the Court *sua sponte* granted rehearing *en banc*. (Pet. App. 33). Thereafter, by an 11-0 vote, the *en banc* Court held, consistent with all other courts of appeals, that "detrimental reliance is an element of a TILA claim for actual damages, that is a plaintiff must present evidence to establish a causal link between the financing institution's noncompliance and his damages." (Pet. App. 12).

ARGUMENT

The vast majority of the Petition is devoted to the contention that the Eleventh Circuit erred by requiring proof of a borrower's reliance on the challenged disclosures by the creditor in order to recover actual damages under TILA. However, Petitioner has not identified any decision by any appellate court that conflicts with the Eleventh Circuit's unanimous *en banc* decision in this case. To the contrary, within just the past year, three other

courts of appeals have held that reliance is required to recover TILA actual damages, and this Court denied certiorari in two of those cases. *Perrone v. General Motors Acceptance Corp.*, 232 F.3d 433 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1601 (U.S. April 16, 2001); *Stout v. J.D. Byrider*, 228 F.3d 709, 718 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 1088 (U.S. Feb. 20, 2001); *Peters v. Jim Lupient Oldsmobile Co.*, 220 F.3d 915, 917 (8th Cir. 2000).

The Petition also argues in passing that certiorari is warranted to resolve the question of whether, in a civil RICO action predicated on mail or wire fraud, the plaintiff must prove detrimental reliance on the alleged misrepresentations. The Eleventh Circuit established a detrimental reliance requirement ten years ago, and it adhered to that precedent in this case. Petitioner argues that the Eleventh Circuit's detrimental reliance requirement conflicts with a footnote in *Tabas v. Tabas*, 47 F.3d 1280, 1294 n. 18 (3d Cir.) (en banc), *cert. denied*, 515 U.S. 1118 (1995), but that footnote was mere dicta. Also, more recent decisions in the Third Circuit cast substantial doubt on the vitality of the *Tabas* dicta. *See Ideal Dairy Farms, Inc. v. John Labatt, Inc.*, 90 F.3d 737, 746-47 (3d Cir. 1996); *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 659 (3d Cir. 1998); *Cullen v. Whitman Medical Corp.*, 188 F.R.D. 226, 233 n. 1 (E.D. Pa. 1999) ("Courts within this Circuit have generally held that in order to state a RICO claim, the plaintiff must show reliance on the underlying mail or wire fraud.").

Petitioner's effort to manufacture the appearance of a conflict between the Eleventh Circuit's decision on the RICO claim and Fifth Circuit precedent is equally

unavailing. Petitioner cites a nine-year old case,[1] but ignores recent decisions in which the Fifth Circuit, like the Eleventh Circuit, has repeatedly held that "[i]n civil RICO claims in which fraud is alleged as a predicate act, reliance on the fraud must be shown." *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 564 (5th Cir. 2001); *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (U.S. Jan. 22, 2001); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000).

Accordingly, certiorari should be denied.

I. The Circuit Courts Uniformly Have Held That Plaintiffs Must Prove Detrimental Reliance to Recover Actual Damages Under TILA

The 11-0 *en banc* decision by the Eleventh Circuit holding that a plaintiff must demonstrate detrimental reliance to recover actual damages under Section 130(a)(1) of TILA, 15 U.S.C. §1640(a)(1), is supported by the plain language of that provision:

> Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to . . . (1) any actual damage sustained by such person *as a result of the failure*; . . .

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[1] *Akin v. Q-L Investments, Inc.*, 959 F.2d 521, 533 (5th Cir. 1992).

15 U.S.C. §1640(a)(1) (1998) (emphasis added). As the Eleventh Circuit correctly recognized, "this language indicates that the statute's authors intended that plaintiffs must demonstrate detrimental reliance in order to be entitled to actual damages under TILA." (Pet. App. 12).

There are *no* appellate decisions that conflict with the Eleventh Circuit's decision. To the contrary, three other courts of appeals considered this issue last year, and each of them held that detrimental reliance is indeed a necessary element of a TILA actual damages claim.

The first of these three recent opinions was *Peters*, which was decided by the Eighth Circuit on August 11, 2000. The Court affirmed the entry of summary judgment for the defendant on plaintiff's claim for actual damages under TILA. The Court agreed with several district court decisions that "the plaintiff must show a real loss or injury caused by the defendant," and it held as follows:

> In order to establish these actual damages, courts have required the plaintiff to show the TILA violation was the proximate cause of any actual damages . . . In order to show causation, a plaintiff must show that: (1) he read the TILA disclosure statement; (2) he understood the charges being disclosed; (3) had the disclosure statement been accurate, he would have sought a lower price; and (4) he would have obtained a lower price.

220 F.3d at 916-917 (citation omitted).

One month later, on September 8, 2000, the Sixth Circuit affirmed the denial of class certification on a TILA actual damages claim in *Stout*. The Sixth Circuit found that the need for each class member to prove reliance

precluded satisfaction of the Rule 23(b)(3) predominance requirement:

> In this case, the district court determined that the factual core of the case was whether each putative class member relied upon false representations or failures to disclose, and if so, what damages were proximately caused by that reliance. We find that this determination did not constitute an abuse of discretion by the district court in light of the fact that any resolution of the fraud or the TILA claims requires an individual assessment of what documents the customer reviewed and in what manner, what representations Defendants made to each customer, and whether the customer selected the extended service agreement.

228 F.3d at 718. This Court denied certiorari in *Stout* on February 20, 2001. 121 S. Ct. 1088.

The *Perrone* opinion was rendered by the Fifth Circuit on November 2, 2000. This Court denied certiorari in *Perrone* on April 16, 2001. 121 S. Ct. 1601. The Fifth Circuit's opinion is comprehensive in scope, and its cogent reasoning amply supports its conclusion that "detrimental reliance is an element of a claim for actual damages" under TILA. 232 F.3d at 434. Just as the Sixth Circuit held in *Stout* and the Eleventh Circuit held in this case, the Fifth Circuit found in *Perrone* that "[s]ince individual reliance is necessary to prove actual damages, a class action may not be certified on this issue." *Id.* at 440.

The Fifth Circuit's opinion in *Perrone* begins with an analysis of the statutory language in 15 U.S.C. §1640(a)(1), which states that a creditor is liable to the

borrower for "any actual damage sustained by such person *as a result of the failure*" to comply with TILA:

> Black's Law Dictionary defines actual damages as "compensation for actual injuries or loss." *Black's Law Dictionary* 35 (6th ed. 1990). They "flow[ ] from injury in fact" and "make good or replace the loss *caused* by the wrong or injury." *Id.* (emphasis added). According to its plain meaning, the statutory remedy of "actual damages" in section 1640(a)(1) requires a direct causal relationship between the amount of damages and the injury or harm. That the "actual damages" must be "sustained by such person as a result of the failure" links the loss to the failure to disclose. 15 U.S.C. §1640(a)(1). *Actual damage is thus sustained as a result of a failure to disclose under the statute if a consumer can show that, had he been properly informed, he would have engaged in a different or less-expensive transaction.*

232 F.3d at 435-36 (emphasis added).

In *Perrone*, the Fifth Circuit stated that, in addition to the fact that the detrimental reliance requirement is supported by the "plain meaning" of the statutory language, "the requirement becomes manifest when §1640(a) is placed in its statutory context and contrasted with the statutory liquidated damages provision." 232 F.3d at 436. The Court explained that:

> The CLA[2] recognizes, however, that damages in these individually small transactions may be

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[2] The CLA is the Consumer Leasing Act, 15 U.S.C. §§1667-1667(e), which comprises Chapter 5 of the TILA and adopts TILA's civil remedies provision, including the actual damages remedy, for violations of lease disclosure requirements. 15 U.S.C. §§1640, 1667(d).

> difficult to prove and adjusts its remedy to afford actual damages or at least a statutory minimum. A comparison of these provisions supports the conclusion that actual damages are based on detrimental reliance. While the actual damages provision requires a causal connection with the disclosure violation, 15 U.S.C. §1640(a)(1), the statutory damages provision dispenses with causation and imposes a penalty solely for failure to comply with disclosure requirements. 15 U.S.C. §1640(a)(2). *Without a causation requirement, actual damages would overlay the statutory damages for no apparent reason. Conceptually, however, statutory and actual damages perform different functions: statutory damages are reserved for cases in which the damages caused by a violation are small or difficult to ascertain. Actual damages may be recovered where they are probably caused by the violation. In this way, the damage measures are complementary rather than duplicative.*
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> The caselaw confirms that statutory damages may be imposed as a means to encourage private attorneys general to police disclosure compliance even where no actual damages exist . . . On the other hand, actual damages have consistently been recognized as more difficult to prove . . . The distinction between statutory and actual damages comports with the notion that actual damages must be assessed as an individualized harm.

232 F.3d at 436-37 (emphasis added, citations omitted).

In sum, no conflict exists among the Circuits requiring resolution by this Court. All four circuit courts that have examined the issue have agreed that detrimental

reliance on the challenged disclosure statements must be shown to recover actual damages under TILA.

II. The Decision Below Presents No Question of Exceptional Importance

Apparently dissatisfied with the $500,000 ceiling on statutory damages recoverable in a TILA class action (15 U.S.C. §1640(a)(2)(B)), Petitioner contends that "detrimental reliance cannot be imposed as an element of a TILA actual damages claim, because to do so makes the recovery of actual damages and the prosecution of a class action almost impossible." (Petition at 13). However, Petitioner's view of proper "[p]olicy considerations cannot override [the] interpretation of the text and structure of [an] Act." *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 168 (1994).

In *Central Bank*, this Court held that no civil liability exits for "aiding and abetting" under Section 10(b) of the Securities Exchange Act of 1934, because the "words 'aid' and 'abet' were not part of the statutory text." 511 U.S. at 176-77. In response to the policy argument that civil aiding and abetting liability would advance the purposes of the Securities Exchange Act, the Court stressed that the "issue . . . is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute." *Id.* at 177.

Here, too, Petitioner's personal opinions as to the assertedly inadequate deterrent effect of the TILA statutory damages remedy cannot override the balance struck by Congress between the need to deter potential violations and the desire to avoid subjecting creditors to

ruinous liability without proof of "actual damages" sustained "as a result of" a disclosure violation. As the Eleventh Circuit stated, "Congress placed [a] ceiling on a defendant's statutory [damages] liability in a class action so that courts would no longer have to 'choose between denying class actions altogether or permitting multi-million dollar recoveries against defendants for minor or technical violations." (Pet. App. 7).

Petitioner's hyperbole that a detrimental reliance requirement for actual damages under TILA "reduces that statute to a shell of the statute Congress intended and created" (Petition at 27) ignores the statutory damages provision, which does not require proof of detrimental reliance, as well as the many other powerful enforcement mechanisms in TILA pointed out by the Eleventh Circuit (Pet. App. 5-6), which deter wrongdoing by creditors. As the Third Circuit recently commented, "[t]hese provisions offer meaningful deterrents to violators of the TILA if private enforcement actions should fail to fulfill that role." *Johnson v. West Suburban Bank*, 225 F.3d 366, 375 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 1081 (U.S. Feb. 20, 2001).

TILA gives general enforcement power to the Federal Trade Commission as its "overall enforcing agency," and permits it to employ its powers under the Federal Trade Commission Act, *see* 15 U.S.C. §1607(c), such as the issuing of cease and desist orders, *see* 15 U.S.C. §45. TILA also grants enforcement authority to the variety of Federal banking agencies that regulate lending institutions. *See* 15 U.S.C. §1607(a). In the event of a violation, the enforcing agencies are authorized to "make an adjustment to the account of the person to whom credit was extended, to

assure that such person will not be required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower." 15 U.S.C. §1607(e)(1). TILA also imposes criminal liability on persons who willfully and knowingly violate the statute. 15 U.S.C. §1611. TILA also cross-references section 8 of the Federal Deposit Insurance Act, 12 U.S.C. §1818, which sets forth other enforcement powers, *see* 15 U.S.C. §1607(a)(1). Under Section 8 of the Federal Deposit Insurance Act, the banking agencies may impose monetary penalties of up to $5,000 per day (or $25,000 per day if the violations are part of a pattern of misconduct), *see* 12 U.S.C. §1818(i), or in some instances order the suspension and removal of institution directors or officers, *see* 12 U.S.C. §1818(e).[3]

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[3] The legislative history surrounding the original enactment of TILA in 1968 reflects the importance of administrative enforcement in securing the rights of most consumers. The House Report, prepared by the Committee on Banking and Currency, explained that enforcement on the administrative level was essential to the legislative purpose of the Act. *See* H.R. Rep. No. 90-1040 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1975. "For the relatively unsophisticated consumer, particularly those of modest means, administrative enforcement will provide their only protection against unscrupulous merchants or lenders." *Id.* The Report also characterizes the civil remedies as secondary to the administrative ones. "While primary enforcement of the bill would be accomplished under the administrative enforcement section discussed above, further provision is made for the institution of civil action by an aggrieved debtor." *Id.* at 1976.

III. The Legislative History of TILA Supports a Detrimental Reliance Requirement

As recognized by both the Eleventh Circuit in this case (Pet. App. 12) and the Fifth Circuit's opinion in *Perrone* (232 F.3d at 440 and n. 7), the conclusion that detrimental reliance is an essential element of a claim for actual damages under TILA is compelled not only by the plain meaning of the statutory language, but also by the legislative history of TILA.

There is ample legislative history showing that Congress has long intended to require proof of reliance to recover actual damages under TILA, and has repeatedly recognized that, as a result, actual damages will be very difficult to prove. As the Eleventh Circuit noted (Pet. App. 12), the legislative history of the Truth in Lending Amendments Act of 1995 (Pub. L. No. 104-29, 109 Stat. 271) reaffirmed the requirement of detrimental reliance. The House Report stated as follows:

> Congress provided for statutory damages because actual damages in most cases would be nonexistent or extremely difficult to prove. *To recover actual damages, consumers must show that they suffered a loss because they relied on an inaccurate or incomplete disclosure.*

H.R. Rep. No. 104-193 at 258 (104th Cong., 1st Sess.) (1995) (emphasis added).

In the course of adopting this legislation, one of its sponsors stated:

> Section 130(a) of TILA allows a consumer to recover both actual and statutory damages in

> connection with TILA violations. However, statutory damages are provided in TILA because actual damages, which require proof that the borrower suffered loss in reliance on the inaccurate disclosure, are extremely difficult to establish. *To recover actual damages, consumers must show that they suffered a loss because they relied on an inaccurate or incomplete disclosure.*

141 Cong. Rec. H9516 (September 27, 1995) (statement of Rep. McCollum) (emphasis added).

The Senate Report discussing the 1974 amendments to TILA, which capped the statutory damages available in class actions and also provided for the recovery of actual damages, stated that "[s]ince *it is difficult to prove any actual monetary damage arising out of a disclosure violation,* the Act provides that a consumer bringing a successful action is entitled to collect court costs and reasonable attorney's fees plus twice the amount of the finance charge but not less than $100 nor more than $1,000." S. Rep. No. 93-278, at 14 (1974) (emphasis added). This Report further states that " *'[m]ost Truth in Lending violations do not involve actual damages* and . . . some meaningful penalty provisions are therefore needed to ensure compliance.' " *Id.* at 15 (emphasis added).

There are numerous such statements throughout the legislative history of TILA:

> "While there is no limit on actual damages under the Truth in Lending Act, there are almost never any actual damages." 119 Cong. Rec. 25418 (July 23, 1973) (remarks of Sen. Proxmire).

* * *

> "The actual damages resulting from abuses of disclosure . . . are usually negligible or extremely difficult to prove." 119 Cong. Rec. 25419 (July 23, 1973) (remarks of Sen. Hart).
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> * * *
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> " . . . without a fixed penalty, there will be many instances where actual damages alone will provide little or no effective remedy for the consumer who relied on inaccurate disclosures to his detriment." S. Rep. No. 720, 95th Cong., 2d Sess. 16 (1978).
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> * * *
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> " . . . without a fixed penalty, there will be many instances where actual damages alone will provide little or no effective remedy for the consumer who relied on inaccurate disclosures to his detriment." S. Rep. No. 73, 96th Cong. 1st Sess. 18 (1979).

Petitioner's view that actual damages should be automatically recoverable in the event of a TILA violation flies in the face of legislative history and judicial decisions spanning 27 years, which have consistently recognized that actual damages are very difficult to prove and thus will often not be recoverable. Moreover, adoption of Petitioner's position would subject creditors with large portfolios to potentially ruinous actual damages in class actions, enabling plaintiffs' class action attorneys to do an end-run around the class action statutory damages ceiling imposed by Congress in 1974. Act of October 28, 1974, §407, Pub. L. No. 93-495, 88 Stat. 1500 (1974). Without a detrimental reliance requirement for actual damages, the problem of run-away statutory penalties in TILA class actions that existed in the early 1970's would be replaced

by the specter of unlimited actual damages in such actions.

IV. The Eleventh Circuit's Requirement of Detrimental Reliance For Civil RICO Actions Predicated on Mail or Wire Fraud Does Not Conflict with the Third or Fifth Circuits

The Petition briefly argues that there is a purported conflict between the decision of the Eleventh Circuit and holdings of the Third and Fifth Circuits on the question of whether a plaintiff alleging a civil RICO claim predicated on mail or wire fraud must prove detrimental reliance on the alleged misrepresentations. No such conflict exists.

The Eleventh Circuit's unanimous panel decision in this case adhered to its longstanding rule, first articulated in 1991, that a plaintiff alleging a RICO claim based on mail or wire fraud "must have relied to his detriment on misrepresentations made in furtherance" of the alleged scheme to defraud. (Pet. App. at 31), *quoting Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991). As the Eleventh Circuit pointed out in both this case and *Pelletier*, the detrimental reliance requirement is supported by this Court's decision in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985), where the Court held that, under Section 1964(c) of RICO, "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." Thus, plaintiff's damages must "flow from the commission of the predicate acts." *Id.* at 497.

Petitioner argues that the Eleventh Circuit's detrimental reliance requirement conflicts with decisions by

the Third and Fifth Circuits, but she cites outdated cases and ignores more recent decisions by those courts that, like the Eleventh Circuit and numerous other circuits,[4] impose a detrimental reliance requirement. Such a requirement is compelled by the plain language of Section 1964(c), which provides that "[a]ny person injured in his business or property *by reason of* a violation of section 1962 of this chapter may sue therefor . . . " (emphasis added). In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68 (1992), this Court explicitly confirmed that the "by reason of" language in RICO requires a causal connection between the predicate mail or wire fraud and a plaintiff's injury that includes "but for" and "proximate" causation. The detrimental reliance requirement "is consistent with *Holmes'* admonition that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiff's injuries and the underlying RICO violation." *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 560 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (U.S. Jan. 22, 2001).

Petitioner's reliance on a footnote in *Tabas v. Tabas*, 47 F.3d 1280, 1294 n. 18 (3d Cir.) (en banc), *cert. denied*, 515 U.S. 1118 (1995) is misplaced, because that footnote was mere *dicta*.[5] More recent Third Circuit decisions plainly

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[4] *See, e.g., Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Appletree Square I v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994); *Central Distributors of Beer, Inc. v. Conn*, 5 F.3d 181, 184 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990); *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1253 (7th Cir. 1989).

[5] The Court's decision did not turn on the reliance issue, but instead focused on RICO's "continuity" requirement.

show that it has not abolished the reliance requirement. For instance, in *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 746-47 (3d Cir. 1996), the Court affirmed the dismissal of a RICO claim for the same reasons it affirmed the dismissal of a common law fraud claim: "[Plaintiff] cannot now claim that it detrimentally relied on [defendant's] intentional misrepresentation because [plaintiff] knew it was being overcharged for purchases almost from the start." Similarly, in *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 659 (3d Cir. 1998), the Third Circuit affirmed the dismissal of a RICO claim based on a land fraud scheme because plaintiffs failed to allege what statements they relied upon.

Moreover, other courts have recognized that the *dicta* in the *Tabas* footnote is not controlling law in the Third Circuit. In a post-*Tabas* decision by a district court within the Third Circuit, the court stated that "[c]ourts within this Circuit have generally held that in order to state a RICO claim, the plaintiff must show reliance on the underlying mail or wire fraud." *Cullen v. Whitman Medical Corp.*, 188 F.R.D. 226, 233 n. 1 (E.D. Pa. 1999) (citations omitted). Similarly, in *Summit Properties*, the Fifth Circuit observed that many circuits "require a showing of detrimental reliance by the plaintiff" to state a RICO claim, and in support of that proposition it cited the *Ideal Dairy Farms* decision by the Third Circuit. 214 F.3d at 560 and n. 16.

Nor does the Eleventh Circuit's decision conflict with the Fifth Circuit. Once again, Petitioner has disregarded a number of very recent Fifth Circuit decisions that have *required* detrimental reliance to state a RICO claim. *See, e.g., Summit Properties*, 214 F.3d at 562:

> In sum, when civil RICO damages are sought for injuries resulting from fraud, a general requirement of reliance by the plaintiff is a common-sense liability limitation. To hold otherwise would allow the threat of treble damages and attorney fees to infiltrate garden variety products liability cases whenever marketing promotions touted the merits of the products, even if no plaintiff relied on those representations.

Accord Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 564 (5th Cir. 2001); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000).

Accordingly, there is no conflict between the circuits that has been created by the Eleventh Circuit's holding on the RICO claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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